No. 96-1613-CSX Title: United States, Petitioner
v.
Estate of Francis J. Romani

Docketed: April 11, 1997 Court: Supreme Court of Pennsylvania, Western District

Entry	Date	Proceedings and Orders
	Apr 10 1997	Petition for writ of certiorari filed. (Response due May 27, 1997)
	May 5 1997	Order extending time to file response to petition until May 27, 1997.
	May 27 1997	Brief of respondent Romani Industries in opposition filed.
	Jun 10 1997	DISTRIBUTED. June 26, 1997
	Jun 27 1997	Petition GRANTED. SET FOR ARGUMENT January 12, 1998. **********
	Jul 9 1997	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
	Aug 6 1997	Brief of petitioner United States filed.
	Aug 19 1997	Order extending time to file brief of respondent on the merits until October 3, 1997.
	Sep 12 1997	Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
	Sep 26 1997	Order extending time to file brief of respondent on the merits until October 6, 1997.
	Oct 6 1997	Brief of respondent Estate of Francis J. Romani filed.
	Nov 5 1997	Reply brief of petitioner United States filed.
	Nov 25 1997	CIRCULATED.
	Dec 17 1997	Record filed.
	Jan 12 1998	ARGUED.

1 pp

Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since 1797, Congress has provided that any claim of the United States against an insolvent estate "shall be paid first" (31 U.S.C. 3713(a)). Since 1913, Congress has provided that a federal tax lien is not valid against a judgment lien creditor until notice of the tax lien has been filed (26 U.S.C. 6323(a)).

The question presented in this case is whether a federal tax claim against an insolvent estate is to "be paid first" when a judgment lien arose before the notice of tax lien was filed.

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ESTATE OF FRANCIS J. ROMANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a-13a) is reported at 688 A.2d 703. The opinions of the Superior Court (App., *infra*, 15a-20a) and the Court of Common Pleas (App., *infra*, 21a-25a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

1. 26 U.S.C. 6323(a) provides, in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary.

2. 31 U.S.C. 3713(a) provides, in relevant part:

> (1) A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or
>
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.

STATEMENT

1. On January 25, 1985, a judgment for $400,000 was entered in favor of Romani Industries, Inc., against Francis J. Romani in the Court of Common Pleas of the Commonwealth of Pennsylvania. Romani Industries did not obtain a writ of execution, or otherwise seize any property of the debtor, in satisfaction of the judgment. The judgment remains unpaid (App., *infra*, 22a).

After the date of that judgment, the Internal Revenue Service filed notices of federal tax liens on the property of Francis J. Romani. A federal tax lien arises by operation of law in the property of any taxpayer who "neglects or refuses to pay the [tax] after demand" (26 U.S.C. 6321). A notice of the federal tax lien is filed in the office "designated by the laws of [the] State, in which the property subject to the lien is situated" (26 U.S.C. 6323(f)). The liens for which notices were filed in this case were for unpaid taxes and penalties totaling approximately $400,000 for the years 1982, 1985, 1987, 1988 and 1989 (App., *infra*, 2a).

Mr. Romani died on January 13, 1992. The administrator of his estate sought to transfer the only asset of the estate—real estate having a value of approximately $53,000—to Romani Industries in satisfaction of its outstanding judgment claim. The United States objected to that transfer and filed a proof of claim for federal taxes and interest totalling approximately $489,000 (App., *infra*, 2a). Because the debts of the estate greatly exceed its assets, and the estate is thus insolvent (*ibid.*), the United States claimed first priority for payment of its claim from the assets of the estate under what is known as the "absolute priority" statute. That statute was first

enacted in 1797 (Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515) and is now codified at 31 U.S.C. 3713(a). It provides, in relevant part, that "[a] claim of the United States Government shall be paid first when * * * the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." *Ibid.*[1]

Romani Industries contended, however, that the "absolute priority" that Congress established in 31 U.S.C. 3713(a) for claims of the United States against insolvent estates has been impliedly repealed, for tax claims, by 26 U.S.C. 6323(a). That statute, which was first enacted in 1913 (Act of March 4, 1913, ch. 166, 37 Stat. 1016), provides that the federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary." 26 U.S.C. 6323(a). Romani Industries claimed that, because it became a "judgment lien creditor" before notice of the federal tax lien was filed, it is entitled to priority under 26 U.S.C. 6323(a) and that the "absolute priority" rule of 31 U.S.C. 3713 is therefore inapplicable to this case.

2. a. The Court of Common Pleas agreed with Romani Industries that 26 U.S.C. 6323(a) impliedly repealed—for federal tax debts—the "absolute priority" rule of 31 U.S.C. 3713(a) (App., *infra*, 21a-25a).

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[1] Under this "absolute priority" statute, the claims of the United States are also to be paid first when an insolvent debtor "makes a voluntary assignment of property," when property of an absent debtor is attached, or when "an act of bankruptcy is committed" (31 U.S.C. 3713(a)(1)). In 1978, however, Congress amended the statute to make it inapplicable to bankruptcy cases brought "under title 11" of the United States Code (31 U.S.C. 3713(a)(2)). See note 6, *infra*.

The court did not discuss or cite the several federal decisions that have rejected this interpretation of these federal statutes. See, *e.g.*, *Nesbitt* v. *United States*, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied, 451 U.S. 984 (1981); *Kentucky* v. *United States*, 383 F.2d 13, 14 (6th Cir. 1967). Instead, the court adopted the reasoning of one of the conflicting opinions of the equally-divided court in *In re Estate of Berretta*, 426 A.2d 1098 (Pa. 1981), which concluded that the provisions of 26 U.S.C. 6323(a) evidence a congressional intent to limit the "absolute priority" otherwise established for the collection of federal claims (App., *infra*, 24a).[2] The court stated that this conclusion is supported by the policy concern that application of the "absolute priority" statute to federal tax claims could "frustrate legitimate commercial expectations" (*id.* at 23a).

b. The Superior Court affirmed (App., *infra*, 15a-20a). The court concluded that the governing principle of statutory construction is that an inconsistency between conflicting provisions is to be resolved by allowing the more specific provision to prevail over

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[2] The Pennsylvania courts have long taken a narrow view of the "absolute priority" statute, in a series of cases that are collected and criticized in Note, Nesbitt *v.* United States: *Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 753-759 (1984). The opinion from *Estate of Berretta* on which the court chose to rely in this case was criticized by the opposing opinion from the equally-divided court in *Estate of Berretta* because it "transformed its view of what Congress *should* do into the presumption that Congress has in fact impliedly repealed the Insolvency Statute as to tax liens." *In re Estate of Berretta*, 426 A.2d at 1108 (Roberts, J.).

the more general one (*id.* at 20a). The court stated that 26 U.S.C. 6323(a) is the more specific provision and should therefore prevail over "the general provisions of Section 3713" in any conflict between them (App., *infra*, 20a).

The Superior Court acknowledged that this Court has held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command as that of" the absolute priority statute (App., *infra*, 18a, quoting *United States* v. *Emory*, 314 U.S. 423, 433 (1941)). The Superior Court concluded, however, that this exacting standard is met—and that the two statutes are "most certainly, conflicting"—because "[i]n the present context * * * the government's relative priority as a creditor differs depending upon which section is applied" (App., *infra*, 19a).

c. The Supreme Court of Pennsylvania affirmed (App., *infra*, 1a-13a). The court acknowledged that the test applied by this Court in *United States* v. *Key*, 397 U.S. 322 (1970), governs in determining whether 26 U.S.C. 6323(a) impliedly repealed the "absolute priority" rule of 31 U.S.C. 3713(a) for the collection of tax debts (App., *infra*, 5a-6a). In *Key*, the Court stated that an implied repeal of the "absolute priority" statute cannot be found unless (i) there is a facial or "logical[] inconsisten[cy]" between the two statutes, (ii) the allegedly conflicting statute would "be rendered redundant" if the "absolute priority" statute applied or (iii) the "language or legislative history" of the allegedly repealing provision reveals "a purpose incongruous with * * * application" of the absolute priority rule. 397 U.S. at 326.

The Pennsylvania Supreme Court determined that the two statutes are facially inconsistent because,

"with respect to tax liens, section 6323 provides for a 'first in time' priority while section 3713 gives absolute priority to the United States" (App., *infra*, 6a-7a; footnote omitted). The court concluded that the history and purpose of Section 6323(a) evidence "a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent" (App., *infra*, 13a).[3]

The Pennsylvania Supreme Court stated that its conclusions were reinforced by the rationale of this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, this Court held that, in the absence of any federal statutory directive, the relative priority of private liens and consensual liens that arise from government lending programs is to be determined under nondiscriminatory state laws. 440 U.S. at 740.[4] This Court noted in *Kimbell Foods* that commercial transactions

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[3] Although the court sought generally to rely on the legislative policies reflected in the Federal Tax Lien Act, nothing in the history of that Act addresses the specific issues presented in this case. See *Nesbitt* v. *United States*, 445 F. Supp. at 829. To the contrary, in enacting the Federal Tax Lien Act (and on one later occasion as well) Congress *declined* to enact a proposal to repeal the "absolute priority" statute as applied to federal tax claims (*ibid.*):

> This Court cannot lightly disregard the fact that Congress has been requested on at least two occasions to amend § 3466 in a manner which would achieve the result sought here by plaintiff, but it has not yet so amended that section.

[4] The Pennsylvania Supreme Court recognized that "*Kimbell Foods* involves the priority to be accorded a federal consensual loan where the debtor is solvent, and the case at bar involves the question of the priority to be accorded a federal tax lien where the debtor is insolvent" (App., *infra*, 11a).

are ordinarily formed in reliance upon state commercial law and that a different rule for commercial transactions involving the federal government could upset ordinary business expectations. *Id.* at 739. The Pennsylvania Supreme Court reasoned that this same concern applies to the present case, for "the grant of absolute federal priority in insolvency cases, as in solvency cases, would be destructive of commercial stability and would frustrate legitimate commercial expectations" (App., *infra*, 13a).

The Pennsylvania Supreme Court noted that its holding conflicts with the decisions of the "federal courts that have held that section 3713 provides for absolute priority in tax lien cases" (App., *infra*, 12a n.17, citing, *e.g.*, *Nesbitt* v. *United States*, *supra*). The court stated, however, that it was "not persuaded by the reasoning of" those decisions (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the Pennsylvania Supreme Court fails to honor this Court's repeated admonition that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of [31 U.S.C. 3713]" (*United States* v. *Key*, 397 U.S. at 324-325, quoting *United States* v. *Emory*, 314 U.S. 423, 433 (1941)). The decision in this case directly conflicts with the decisions of two federal courts of appeals and numerous other federal courts. *E.g.*, *Nesbitt* v. *United States*, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied, 451 U.S. 984 (1981); *Kentucky* v. *United States*, 383 F.2d 13, 14 (6th Cir. 1967); App., *infra*, 12a n. 17. The question presented is one of recurring importance to the administration of the tax laws. Resolution of the conflict on this recurring

question is needed to assure uniform treatment of taxpayers and to "ensure as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

1. a. One hundred and eighty years ago, this Court held that the "absolute priority" statute requires that debts owed to the United States be paid first from insolvent estates even if a competing creditor had previously obtained a valid and enforceable judgment lien. In *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396, 425 (1817), as in the present case, the facts fell "precisely within" the scope of the absolute priority statute. The Court stated that (*ibid.*) (emphasis supplied):

> the question still remains * * * whether this right of preference [under the absolute priority statute] can cut out a prior judgment creditor? The law declares "that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied * * *. *These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity.* * * * *The law makes no exception in favour of prior judgment creditors; and no reason has been, or we think can be, shown to warrant this court in making one.*

The Court concluded in *Thelusson* that, whenever title and possession remain in "the debtor's estate," the claim of the United States is to "be first satisfied" under the statute. *Id.* at 426. As Justice Cardozo explained for the Court more than a century later, "[t]he ruling [in *Thelusson*] was that the

general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the [absolute priority] statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. 290, 293 (1933). Accord, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); *United States* v. *Texas*, 314 U.S. 480, 485-486 (1941).[5]

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[5] This Court has "repeatedly reserved the question whether the priority given the United States by [31 U.S.C. 3713(a)] can be overcome even by a prior specific and perfected lien." *United States* v. *Vermont*, 377 U.S. 351, 358 n.8 (1964). The Court has never decided the issue because it has found, in each case, that the competing lien had not divested the debtor of title or possession and that the lien was therefore not sufficiently specific for the question to be squarely raised. See, *e.g.*, *ibid.*; *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 365-366 (1953); *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 370 (1946); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355-356 (1945); *United States* v. *Texas*, 314 U.S. 480, 484-486 (1941); *New York* v. *Maclay*, 288 U.S. 290, 294 (1933); *Spokane County* v. *United States*, 279 U.S. 80, 95 (1929).

The Court has concluded that a mortgage may effect a transfer of title, taking the property outside the estate of the debtor and therefore beyond the reach of the absolute priority statute. See *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) 386, 445-446 (1828). In so ruling, the Court did "not contemplate that exceptions were being made" from the absolute priority statute; instead, it "conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor." *Massachusetts* v. *United States*, 333 U.S. 611, 634 n.38 (1948). The Court "has been loath to expand" such an exception "to include other types of lien." *Ibid.* The Court has emphasized that none of its decisions lend "support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien." *United States* v. *Texas*, 314 U.S. at 486.

Recognizing that "[t]he law makes no exception in favour of prior judgment creditors" (*Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) at 425), the Court has consistently held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation" of the absolute priority statute (*United States* v. *Emory*, 314 U.S. at 433). Under the analysis applied by the Court in *United States* v. *Key*, 397 U.S. at 324-325, such a "plain[] inconsistency" could be said to exist only if (i) the competing statute is logically inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would deprive the competing statute of any meaning; or (iii) the history and text of the competing statute reflect an actual intent by Congress to modify the absolute priority statute. See also *id.* at 326-332.[6]

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[6] Outside of bankruptcy proceedings, which are now expressly excepted from the coverage of the statute (31 U.S.C. 3713(a)(2)), this Court has never upheld a claim that Congress has impliedly repealed any aspect of the absolute priority statute. In *United States* v. *Randall*, 401 U.S. 513, 517 (1971), the Court noted that the absolute priority statute had been superseded, for bankruptcy cases, by "the specific priorities granted by Congress [to claims of the United States] in the Bankruptcy Act" (401 U.S. at 517). In *United States* v. *Key*, 397 U.S. at 326-330, however, the Court emphasized that the absolute priority statute "must apply according to its terms except where expressly superseded, or where excluded by a later enactment 'plainly inconsistent' with it" (397 U.S. at 332). Applying this standard, the Court concluded in *Key* that bankruptcy provisions requiring "fair and equitable" treatment of creditors did not justify a departure from the absolute

The test applied by this Court in determining whether an implied exception from the statute exists is not satisfied in this case. As the Sixth Circuit explained in *Kentucky* v. *United States*, 383 F.2d at 14-15, the plain language of the "absolute priority" statute refutes the contention that it has been impliedly repealed for tax claims by 26 U.S.C. 6323(a):

> We at once emphasize that, of the statutes involved, one * * * is a priority statute, and the other—26 U.S.C. § 6323—is a lien statute. If we employ a literal reading of [the absolute priority statute], its language provides the answer to the question before us. We requote it for emphasis:
>
> > "*Whenever* * * * the estate of any deceased debtor, in the hands of the executors or administrators, is *insufficient to pay all the debts due from the deceased*, the debts due to the United States *shall be first satisfied.*

priority Congress established for the claims of the United States. Similarly, in *United States* v. *Emory*, the Court rejected the contention that Section 64 of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, which gave certain wage claimants priority over tax and non-tax claims of the United States, impliedly repealed the absolute priority statute in non-bankruptcy cases. In a holding equally applicable to the present case, the Court stated in *Emory* (314 U.S. at 427):

> Neither the language of § 64a nor the Congressional history of the legislation here involved supports the proposition that § 64a was intended to eliminate, either partially or wholly, the priority of claims of the United States in non-bankruptcy proceedings.

See also *Massachusetts* v. *United States*, 333 U.S. 611 (1948).

> The essentials for application of the statute are here present—the taxpayer is deceased; he was a debtor of the United States; his estate is insufficient to pay all his debts. Present these essentials, the debts owing the United States "shall be first satisfied."

The Ninth Circuit reached the same conclusion in *Nesbitt* v. *United States*, 445 F. Supp. at 828, adopted by reference, 622 F.2d at 433:[7]

> There is nothing in either the language or the legislative history of [26 U.S.C. 6323] to indicate that Congress intended to make tax liens the federal government's sole remedy for the collection of unpaid taxes. To the contrary, Congress intended tax liens to supplement existing means for the collection of taxes, including [the absolute priority statute]. There is therefore no basis for saying that Congress, by

[7] The Pennsylvania Supreme Court did not suggest that 26 U.S.C. 6323(a) would have no meaning if it did not impliedly repeal the absolute priority statute. The two statutes obviously differ in their scope and are not logically inconsistent: the absolute priority statute governs the priority of claims of the United States only in insolvencies outside of bankruptcy court (see 31 U.S.C. 3713(a)(2)); by contrast, 26 U.S.C. 6323(a) governs the validity of the federal tax lien against specific types of security interests in cases involving solvent debtors and also in the many insolvency situations to which the absolute priority statute is inapplicable. This Court has often noted that Congress has intentionally chosen to establish greater protection for the United States in cases involving insolvent debtors than in cases "[w]here the debtor is not insolvent." *United States* v. *Vermont*, 377 U.S. at 358. See also *United States* v. *Key*, 397 U.S. at 329; *United States* v. *New Britain*, 347 U.S. 81, 85 (1954).

> creating federal tax liens, intended to modify [the absolute priority statute] in any way.

Justice Whittaker expressed the same views in his concurring opinion in *James* v. *United States*, 366 U.S. 213, 252 & n.4 (1961), in which he concluded that the absolute priority statute remains applicable to tax claims notwithstanding the enactment of 26 U.S.C. 6323. He stated that, "even though the tax claim of the Government may be only a general lien, with notice thereof not yet filed in the proper local office pursuant to 26 U.S.C. § 6323, we have held that it must be accorded priority over the claims of all prior general lienholders" and it therefore has priority in insolvency cases "over the claims of others, including 'judgment creditors.'" 366 U.S. at 252 & n.4.

The Pennsylvania Supreme Court acknowledged (App., *infra*, 12a n.17) that its decision in this case directly conflicts with numerous federal decisions. Because of these conflicting decisions, taxpayers, creditors and the United States will receive different treatment of identical claims solely as a result of geographical happenstance.

b. The Pennsylvania Supreme Court erred in relying on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), as guidance "on the policy considerations that underlie the question of whether the government in the tax arena is to be treated as an ordinary creditor or as a creditor with super-priority" (App., *infra*, 7a). The *Kimbell Foods* case did not involve federal tax claims; nor did it involve insolvent debtors. Instead, it involved "the priority to be accorded a federal consensual loan where the debtor is solvent" (App., *infra*, 11a). The Court expressly noted in *Kimbell Foods* that, when the government is

an involuntary creditor of an insolvent taxpayer, an entirely different set of statutory rules and policy concerns becomes applicable (440 U.S. at 734):

> That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied * * * . The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. By contrast, when the United States operates as a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to provoke protective measures against defaulting debtors in a manner disruptive of existing credit markets.

As an involuntary creditor of delinquent taxpayers, the government cannot "control the factors that make tax collection likely." *Id.* at 736. As a consensual lender, however, the government acts "voluntarily, with detailed knowledge of the borrower's financial status" (*ibid.*).

Recognizing the significant difference between federal tax liens and the consensual liens created under government loan programs, the Court stated in *Kimbell Foods* that "'[a]s a quasi-commercial lender, [the government] does not require . . . the special priority which it compels as sovereign' in its tax collecting capacity." 440 U.S. at 737-738, quoting 557 F.2d at 500. The Pennsylvania Supreme Court thus plainly erred in relying on *Kimbell Foods* in determining the scope of the priority created by statute for the collection of non-consensual debts owed by insol-

vent debtors to the United States "in its tax collecting capacity" (440 U.S. at 738).

c. The Pennsylvania Supreme Court also erred in concluding that the legislative history of 26 U.S.C. 6323(a) reflects an intent by Congress impliedly to repeal the absolute priority statute.

(i) The absolute priority statute is derived from ancient English practice, under which the Crown asserted for itself a priority over all other creditors of an insolvent debtor.[8] In the United States, this priority of the sovereign initially applied only to debts due on bonds and for customs duties. See Act of July 31, 1789, ch. 5, § 21, 1 Stat. 29. By 1797, however, it was made applicable to all debts due the United States from the estate of an insolvent debtor, under a statute whose language has since remained substantially unchanged. See Act of March 3, 1797, *supra*; Act of March 2, 1799, ch. 22, § 65, 1 Stat. 627.

Congress has frequently amended, codified and recodified the absolute priority statute. Indeed, it has done so twice within the past twenty years. In 1978, Congress amended the absolute priority statute to make it inapplicable to bankruptcy cases. See 31 U.S.C. 3713(a)(2); Act of November 6, 1978, Pub. L. No. 95-598, Tit. III, § 322(a), 92 Stat. 2562. In 1982, Congress recodified the absolute priority statute to make minor revisions in its terminology. See Act of September 13, 1982, Pub. L. No. 97-258, Subtit. III, § 1, 96 Stat. 972. In doing so, however, Congress noted that no substantive change in the law was intended. H.R. Rep. No. 651, 97th Cong., 2d Sess. 2-3 (1982).

Congress has never modified the absolute priority statute to eliminate its application to federal tax

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[8] See 33 Hen. VIII, ch. 39, § 74; 13 Eliz. I, ch. 4.

claims. Indeed, the two most recent amendments reflect that Congress, having repeatedly revisited the statute, has determined to make no changes to its scope other than those expressly enacted. As this Court has often observed, the statute contains as "clear a command" now as ever. *United States* v. *Key*, 397 U.S. at 325.

(ii) The legislative history of 26 U.S.C. 6323 does not support any conclusion to the contrary. Beginning in 1866, Congress established a federal tax lien upon all property owned by a delinquent taxpayer. See 26 U.S.C. 6321; Act of July 13, 1866, ch. 184, § 9, 14 Stat. 101. In response to a decision of this Court holding that an unrecorded tax lien had priority in a delinquent taxpayer's property even over a purchaser for value without notice (*United States* v. *Snyder*, 149 U.S. 210 (1893)), the statute was amended in 1913 to make the tax lien ineffective against a mortgagee, purchaser, or judgment creditor whose interests arose before notice of the tax lien was filed. Act of March 4, 1913, ch. 166, 37 Stat. 1016.

In 1966, Congress determined to give similar protection to additional types of secured transactions. The Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, amended the statute to protect holders of various additional types of commercial security interests from an unfiled tax lien. See H.R. Rep. No. 1884, 89th Cong., 2d Sess. 1-2 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966). The legislative history of that Act, however, reflects that these amendments to the tax lien statute did *not* intend to repeal or modify the absolute priority statute—for Congress declined to enact proposals that had been made at that time for that very purpose. The American Bar Association, which proposed the legislation that resulted

in the Federal Tax Lien Act, had also proposed that the absolute priority statute be amended to subject that statute to the priorities established under the Bankruptcy Act and the Internal Revenue Code. See American Bar Association, *Final Report of the Committee on Federal Liens* 7, 124 (1959) (*Final Report*), contained in *Hearings Before the House Committee on Ways and Means on the Priority of Federal Tax Liens and Levies*, 89th Cong., 2d Sess. 85, 199 (1959).[9] The ABA proposal and report were submitted to Congress, and three bills were introduced containing this proposed revision of the absolute priority statute. *House Hearings*, *supra*, at 75-88, 196-201. These bills, along with the ABA proposal, died in committee. 105 Cong. Rec. 1030, 1258 (1959) (Index).

In 1970, the ABA submitted to the Senate Judiciary Committee a similar proposed amendment to the absolute priority statute. S. 2197, 92d Cong., 1st Sess. (1971); see Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 9-10 (1971). This bill also died in committee.

Congress has thus—on at least two occasions—declined to enact legislation to limit the application of

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[9] The ABA proposed to amend the absolute priority statute to "preserve, ahead of the priority of non-lien federal claims, any non-federal lien or security that would have been entitled to priority over the claim of the United States immediately prior to the divestment of the debtor's property" and to "assure, contrary to the suggestions made in some decisions, that any lien which would qualify for priority in the absence of insolvency would continue to enjoy such priority." *Final Report*, *supra*, at 124. Under the ABA's proposal, the order of priorities specified in 26 U.S.C. 6323(a) would thus have been applicable in insolvency.

the absolute priority statute to tax claims. As the Ninth Circuit concluded in *Nesbitt* v. *United States*, 622 F.2d at 433, aff'g 445 F. Supp. at 829, this history reflects that Congress did *not* intend to change that statute. To the contrary, by recodifying the absolute priority statute in 1982 without making any change in its application to tax claims, Congress reaffirmed the broad and "clear * * * command" of the statute (*United States* v. *Key*, 397 U.S. at 325). The words that Congress has employed in the absolute priority statute remain "broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States" (*United States* v. *Waddill Co.*, 323 U.S. 353, 355 (1945)).

3. Whether 26 U.S.C. 6323(a) impliedly repealed application of the absolute priority statute to federal tax claims is a question of substantial, recurring importance. The question is frequently raised, frequently litigated and often placed in doubt. See App., *infra*, 12a n.17. Many decisions have agreed that the absolute priority statute remains applicable to tax claims. *E.g.*, *Nesbitt* v. *United States*, *supra*; *Kentucky* v. *United States*, *supra*; *H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156, 160 (4th Cir. 1967) (Haynsworth, J., concurring), cert. denied, 392 U.S. 1025 (1968); *Durham* v. *United States*, 545 F. Supp. 1093, 1096 (D.N.J. 1982), aff'd without opinion, 720 F.2d 661 (3d Cir. 1983); *Carter* v. *Carter*, 681 F. Supp. 323, 328 (E.D. Va. 1988); *Estate of Frazier* v. *District Director, Internal Revenue Service*, 92-2 U.S. Tax Cas. (CCH) ¶ 60,120 (N.D. Ga. 1992); *Spira* v. *United States*, 76-2 U.S. Tax Cas. (CCH) ¶ 9600 (1976); *Estate of Silberman* 46 Cal. Rptr. 2d 610 (Ct. App. 1995); *Back* v. *IRS*, 445 A.2d 1057 (Md. Ct. Apec. App. 1982).

Other decisions, however, have agreed with the contrary view adopted by the Pennsylvania Supreme Court in this case. *E.g.*, *City of Vermillion* v. *Stan Houston Equipment Co.*, 341 F. Supp. 707 (D.S.D. 1972); *Talcott, Inc.* v. *Roto American Corp.*, 302 A.2d 147 (N.J. Ch. 1973); see also *Exchange Bank & Trust Co.* v. *Tubbs Mfg. Co.*, 246 F.2d 141 (5th Cir.), cert. denied, 355 U.S. 868 (1957). The question frequently arises in connection with estate proceedings in state courts (*e.g.*, *Succession of Nobles*, 684 So.2d 973 (La. Ct. App. 1996). This yields an even greater potential for disparate results than ordinarily occurs in federal tax litigation.

In the absence of a decision by this Court resolving this conflict, the question whether Section 6323(a) has impliedly repealed application of the absolute priority statute to federal tax claims will continue to foment recurring and wasteful litigation. Disparate treatment of otherwise identically situated taxpayers and creditors would occur, for the applicable rule of priority would then depend upon geographic happenstance. Resolution of this recurring question by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1997

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 59 W.D. Appeal Docket 1995

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

Appeal from the Judgment of Superior Court
entered at No. 1358 Pittsburgh 1994
on May 12, 1995, affirming the order of the
Court of Common Pleas, Cambria County,
Orphan's Court Division entered July 7, 1995
at No. 11-94-14

[Argued: Sept. 17, 1996]
[Decided: Jan. 17, 1997]

OPINION OF THE COURT

Before: FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO and NEWMAN, JJ.

FLAHERTY, Chief Justice.

The United States appeals a judgment of the Superior Court which affirmed an order of the Court of

Common Pleas of Cambria County granting a petition filed by the Estate of Francis J. Romani to transfer real estate in lieu of execution. We affirm. [1]

Francis J. Romani, who died on January 13, 1992, left an insolvent estate with debts greatly exceeding the value of the sole asset, a piece of real estate valued at $53,001.00. This real estate is burdened by a judgment lien and a federal tax lien. On January 25, 1985, a judgment lien was entered and properly revived against Mr. Romani in favor of Romani Industries, Inc. in the amount of $400,000.[2] Subsequent to the entry of judgment against decedent, the Internal Revenue Service filed notice of a federal tax lien against the decedent for unpaid taxes and an unpaid civil penalty that, with interest, totaled $489,720.04.

The administrator of the Estate of Francis J. Romani filed a petition in the Court of Common Pleas of Cambria County to transfer the real estate in lieu of execution on behalf of the judgment creditor, Romani Industries, Inc., and the United States opposed the petition. Both parties claimed priority to the property. The lower court granted the administrator's request for relief, holding that the status of Romani Industries, Inc. as a first-in-time judgment lien creditor gave it priority over the government's subse-

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[1] As the Superior Court noted, although there was no order of final distribution in this case, the practical effect of the court's order was to end the administration of the estate by awarding its sole asset to one of the competing creditors. Therefore, the order is final and appealable. *See Estate of Montgomery*, 367 Pa.Super. 31, 532 A.2d 439 (1987).

[2] The original judgment was entered at No. 1985-205 and it was subsequently revived on June 7, 1989. The 1989 judgment was entered at No. 1989-1311 and remains unpaid.

quently filed tax lien. Order dated July 7, 1994, Court of Common Pleas of Cambria County, G.D. No. 11-94-14. The Superior Court affirmed *per curiam*. *In re Estate of Francis Romani*, 445 Pa.Super. 637, 664 A.2d 1064 (1995). This appeal followed.

The question presented is whether section 6323(a) of the Tax Lien Act,[3] 26 U.S.C. § 6323(a), ("section 6323"), limits the operation of section 3713(a)(1) of the federal insolvency statute, 31 U.S.C. § 3713(a)(1), ("section 3713"), as to tax debts.[4] Romani Industries, Inc. argues that its judgment lien has priority over a tax claim of the United States because, under section 6323, the holder of a properly entered judgment lien has priority over subsequently filed tax lien debts. The United States disagrees, arguing that it has an absolute priority under section 3713 to all proceeds remaining in an insolvent estate, regardless of the time of filing of the tax liens.

Section 6323 provides for a "first in time" priority to the rival lien in federal tax lien matters as follows:

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[3] Tax Lien Act of 1966, Pub.L.No. 89-719, 80 Stat. 1125, amending 26 U.S.C. § 6323.

[4] We addressed this issue in *Estate of Berretta*, 493 Pa. 441, 426 A.2d 1098 (1981) where an evenly divided plurality held that section 6323 impliedly repealed the operation of the relevant insolvency statute, Revised Statutes § 3466, 31 U.S.C. § 191, with respect to tax lien debts of a decedent's insolvent estate. *Berretta* dealt with the relative priority of a "first in time" judgment creditor, a bank, and the United States to certain proceeds remaining from the sale of two parcels of real property included in the insolvent estate of the taxpayer.

Validity And Priority Against Certain Persons

(a) *Purchasers, Holders of Security Interests, Mechanic's Lienors and Judgment Lien Creditors.*—The lien imposed by section 6321 [a federal tax lien] shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary. . . .[5]

Tax liens have been authorized by predecessor tax lien statutes. *See*, Act of July 13, 1866, ch. 184, § 9, 14 Stat. 107. It was not until 1966 with the amendment of section 6323, however, that the statute specified priority rules to resolve conflicts between federal tax liens and rival liens.[6]

Section 3713 provides for an absolute priority for federal tax claims in insolvency as follows:

Priority Of Government Claims

(a)(1) A claim of the United States shall be paid first when-

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all the debts of the debtor.

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[5] Section 6321, 26 U.S.C. § 6321, creates a lien in favor of the United States for the amount of tax that anyone has neglected to pay on the property belonging to such person.

[6] Although section 6323 is undoubtedly a lien statute, it also addresses the priority of federal tax liens against judgment lien creditors. Thus, both statutes address priority of competing liens.

The predecessor to section 3713 was Revised Statute § 3466, 31 U.S.C. § 191, which has been substantially unchanged since 1797. ("section 3466"). *See*, Act of March of [*sic*] March 3, 1797 ch. 20, § 5, 1 Stat. 515.

The Court has not decided the question presented. It has cautioned, however, that in considering whether other provisions of the tax lien act operated as implied exceptions to the insolvency statute, "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of section 3466." *United States v. Emory*, 314 U.S. 423, 433, 62 S.Ct. 317, 322-23, 86 L.Ed. 315, 325 (1941);[7] *United States v. Key*, 397 U.S. 322, 90 S.Ct. 1049, 25 L.Ed.2d 340 (1970).[8] In *Key*, the Court said that a reviewing court is to

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[7] *Emory* involved a federally guaranteed loan under the National Housing Act ("NHA"). When the debtor became insolvent, the United States was owed $5,988.88 as the guarantor of the NHA loan and claimed priority under section 3466. The nonfederal parties claimed "about $900" for wages. The Court held that Section 3466 and the NHA were not plainly inconsistent because there was no provision in the NHA that expressly relinquished the priority of the United States with respect to claims arising under it. 314 U.S. at 430, 62 S.Ct. at 321, 86 L.Ed. at 323.

[8] *Key* involved a bankruptcy reorganization plan that provided for payment of claims of unsecured creditors before full payment of the federal tax claims. The Court found that section 3466 prevailed because no inconsistency existed between that section and three relevant sections of the Bankruptcy Act which required that the United States be paid its taxes under a reorganization plan. The Court concluded that neither the requirement that the United States be paid nor the requirement that the payment be fair and equitable conflicted with the command of section 3466 that the United States be paid first. 397 U.S. at 328-29, 90 S.Ct. at 1053, 25 L.Ed.2d at 346-47.

determine whether the statutes are facially inconsistent and, if so, whether the legislative history of the competing statute reflects a congressional intent to modify the effect of the insolvency statute. *Id.* at 324, 90 S.Ct. at 1051, 25 L.Ed.2d at 344 (1970).[9]

The first issue is whether there is a plain inconsistency between the priority of section 6323 and the absolute priority granted the United States by section 3713. Here, the government's relative priority as a creditor differs depending on which section is applied. Section 6323 states that nonfederal claims that have been duly filed prior to the filing of the federal tax claim are valid as against federal tax claims. On the other hand, section 3713 gives an absolute priority to the United States against other creditors of insolvent debtors for tax liens regardless of when the tax lien was filed. We are constrained to find a facial inconsistency because, with respect to tax liens, section 6323 provides for a "first in time"

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[9] We could utilize a principle of statutory construction to resolve the conflict and conclude that section 6323 limits section 3713. That principle is that a conflict between various statutes is to be avoided and, if possible, the apparent conflicting provisions must be construed together with the more specific provisions prevailing over the general ones. *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Here, section 6323 is the more specific provision because it applies only to federal tax liens, whereas section 3713 is the more general provision in that it applies to any unpaid claim of the government against an insolvent debtor. Therefore, applying this principle of statutory construction, the general provisions of section 3713 are limited by the specific provisions of section 6323.

priority while section 3713 gives absolute priority to the United States.[10]

Since we have determined that the statutes are plainly inconsistent, we next address whether the Tax Lien Act of 1966 evidences a congressional intent that federal priorities in insolvency be limited in the tax area. We look to *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979) as the most recent expression of the Court on the policy considerations that underlie the question of whether the government in the tax arena is to be treated as an ordinary creditor or as a creditor with super-priority. In *Kimbell Foods*, the Court held that Congress intended that the "first in time is first in right" principle of section 6323 applied in federal government lending cases involving solvent debtors.[11]

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[10] The United States argues, and other courts have held, that no plain inconsistency exists between the statutes. *See, e.g., Carter v. Carter and T-Cas of America, Inc.*, 681 F.Supp. 323, 326 (E.D. Va. 1988) where the court said that because Congress was silent on the matter, the court would infer that Congress intended the Tax Lien Act of 1966 to supplement section 3713 and not to displace it so that in certain cases of taxpayer insolvency, section 3713 governs, and in all other cases, section 6323 controls.

We disagree with this conclusion and find support in other federal cases. *See* note 17, *infra*.

[11] In *Kimbell Foods*, O.K. Super Markets, ("O.K.") borrowed, during 1968, $27,000 from Kimbell Foods. The parties executed security agreements containing a standard "dragnet" clause that provided that the collateral would secure future advances from Kimbell Foods. Kimbell Foods properly perfected its security interest.

In February, 1969, O.K. borrowed $300,000 from Republic National Bank, ("bank") with the bank accepting as security the same property specified in Kimbell Foods' 1968 agree-

The Court ruled that government lending agencies, such as the Small Business Administration, are to be afforded the same priority as private lenders under non-discriminatory state laws, absent a congressional directive to the contrary. 440 U.S. at 740, 99 S.Ct. at 1465, 59 L.Ed.2d at 731.

The Court articulated two reasons for its holding. First, Congress, by the passage of the Tax Lien Act of 1966, expressed its disapproval of "unrestricted federal priority" in tax matters. 440 U.S. at 738, 99 S.Ct. at 1463, 59 L.Ed.2d at 730. *See*, 26 U.S.C. §§ 6323(b), (c), (d), and (e). The Court explained that,

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ments. The bank perfected its security interest. The Small Business Administration ("SBA") guaranteed 90% of this loan under the Small Business Act, which does not, in this situation, specify priority rules to govern the SBA's security interests. O.K. used the bank loan to satisfy the remainder of the 1968 obligation to Kimbell Foods and to discharge a debt for inventory purchased from Kimbell Foods on open account. In late 1970, the bank assigned its security interest to the SBA. O.K. defaulted on the SBA-guaranteed loan shortly before mid-January, 1971.

Kimbell Foods continued to sell to O.K. on open account until the debt was over $18,258.57 on January 15, 1971, when Kimbell Foods sued O.K. to recover on its inventory debt. The SBA recorded the bank's assignment on January 21, 1971. The United States honored its guarantee on the defaulted loan and paid the bank 90% of the outstanding debt on February 3, 1971. That same day, O.K., with the approval of its creditors, sold its equipment and inventory and placed the proceeds in escrow pending the resolution of the competing claims to the funds.

A year later, the state court entered judgment against O.K. and awarded Kimbell Foods $24,445.37, which represented the inventory debt and other items. Kimbell Foods then brought suit in early 1972 in federal court to foreclose on its lien, claiming it had a security interest in the escrow fund that was superior to the SBA's interest.

prior to the 1966 law, it had formulated the "choate lien" test which modified the "first in time is first in right" idea by requiring that the nonfederal lien be sufficiently specific and perfected to overcome the priority of the United States in insolvency cases. 440 U.S. at 720, 99 S.Ct. at 1454, 59 L.Ed.2d at 719.[12] The practical effect of the choateness test, the Court said, was that rival liens were defeated because they failed to pass its strict test. *Id.*[13] The Court concluded that the Tax Law of 1966 reflected congressional intent to disapprove unrestricted federal priority in tax matters[14] and to displace the "choateness" doctrine.

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[12] The Court also stated that it applied the choateness doctrine in the solvency context to give federal tax liens special priority. *See United States v. Security Trust & Savings Bank*, *supra*, 340 U.S. at 51, 71 S.Ct. at 111, 95 L.Ed. at 53. For a discussion of the history of the choate lien test, *see* Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905 (1954). *Kimbell Foods*, 440 U.S. at 721 n. 8, 99 S.Ct. at 1454 n. 8, 59 L.Ed.2d at 719 n. 8.

[13] We observe that the Court has not yet held that a perfected and specific lien is excepted from the operation of section 3466 or section 3713. Rather, the Court has raised but avoided the issue in cases before 1966 by holding that the asserted lien was not sufficiently perfected and specific to qualify under any possible exception. *See*, *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071 (1953); *Illinois v. Campbell*, 329 U.S. 362, 67 S.Ct. 340, 91 L.Ed. 348 (1946); *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 65 S.Ct. 304, 89 L.Ed. 294 (1945); *United States v. Texas*, 314 U.S. 480, 62 S.Ct. 350, 86 L.Ed. 356 (1941); and, *New York v. Maclay*, 288 U.S. 290, 53 S.Ct. 323, 77 L.Ed. 754 (1933).

[14] The Court further explained that:

> . . . Of particular relevance here, the Act added mechanic's liens to the list of private interests already protected

440 U.S. at 720 n. 6, 99 S.Ct. at 1454 n. 6, 59 L.Ed.2d at 719 n. 6.[15]

Second, the Court explained that restrictions on federal tax lien priority are necessary to facilitate commercial stability and to avoid the frustration of expectations of superior lien holders. The Court recognized that federal lien priority undercuts the reliability of the notice filing system, which plays a crucial role in commercial dealings. 440 U.S. at 739 n. 42, 99 S.Ct. at 1464 n. 42, 59 L.Ed.2d at 731 n. 42. Prior creditors either have no trustworthy means of discovering the undisclosed security interest or, if they are aware of the federal lien, have to adjust

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against unrecorded tax liens. 26 U.S.C. § 6323(a). Holders of consensual security interests also receive priority over unrecorded tax liens. *Ibid.* Moreover, the Act gives priority to many types of nonfederal liens even when the Government had filed notice of the tax lien. § 6323(b). Included in this group are repairman's liens in personal property, S 6323(b)(5), . . . and in limited situations, liens securing advances. § 6323(c).

440 U.S. at 738 n. 41, 99 S.Ct. at 1464 n. 41, 59 L.Ed.2d at 730 n. 41.

[15] We also note that the legislative history of the Tax Lien Act of 1966 indicates a Congressional intent that priority to the "first in time" lien exists whether a lien was "choate" or not. *See* Senate Finance Committee's Report 1708 which stated:

> [I]t is intended that, under the bill, the various types of interests defined in this provision are to have a priority over a nonfiled Federal tax lien if they come within the definitions of these terms [e. g., "purchaser," "judgment lien creditor," etc.] . . . whether or not in all other regards they are definite and complete at the time notice of the tax lien is filed.

U.S. Code Congressional and Administrative News, 89th Congress, 2d Sess., v. 3, 1966, 3722, 3724-25.

their lending arrangements to protect against the stringent choateness requirements. *Id.*[16] Further, the Court said, considerable uncertainty would also result from the choateness approach because the development of priority rules on a case-by-case basis, depending on the types of competing liens involved, leaves creditors without a definite body of law they require in structuring sound business transactions. *Id.* For these reasons, the Court concluded, Congress intended that restrictions on federal tax lien priority exist.

Although *Kimbell Foods* involves the priority to be accorded a federal consensual loan where the debtor is solvent, and the case at bar involves the question of the priority to be accorded a federal tax lien where the debtor is insolvent, we believe that *Kimbell Foods* and other cases[17] provide guidance as to how the

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[16] Judge Haynsworth observed that the Tax Lien Act of 1966 would be essentially meaningless if the insolvency statute always prevailed. *See*, the concurring opinion of Judge Haynsworth in *H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank*, 388 F.2d 156, 161 (4th Cir. 1967), *cert. den.* 390 U.S. 1025, 88 S.Ct. 1413, 20 L.Ed.2d 282 (1968):

> . . . The question of priorities [between section 6323 and section 3713] is wholly or largely academic, unless the debtor is insolvent, and the clearly stated purpose of the Federal Tax Lien Act of 1966 was to regulate the priority of federal tax claims when competing for payment out of the assets of an insolvent taxpayer with secured claims which would enjoy priority under state law.

[17] *See United States v. Randall*, 401 U.S. 513, 91 S.Ct. 991, 28 L.Ed.2d 273 (1971) (specific priorities of the Bankruptcy Act override the general priority of the United States under section 3466). *See also, United States v. S.K.A. Associates, Inc.*, 600 F.2d 513 (5th Cir. 1979) (SBA lien in an insolvency held not entitled to priority under section 3466); *United States*

federal courts would resolve the case at bar.[18] Here, there is a plain inconsistency between the competing

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v. Burlington Industries, 600 F.2d 517 (5th Cir.1979) (contest between federal agency's security interest and a warehouseman to be decided under nondiscriminatory state law); *City of Vermillion, S.D. v. Stan Houston Equipment Co.*, 341 F.Supp. 707, 713 (D.S.D. 1972).

Court decisions announced before the Tax Lien Act of 1966 support an opposite result. While we do not disregard these cases, we believe that Congressional enactments in the federal tax lien area place the older cases in a less persuasive perspective. *See United States v. Vermont*, 377 U.S. 351, 84 S.Ct. 1267, 12 L.Ed.2d 370 (1964) (in dictum: section 3466 applies to all an insolvent's debts to the government, whether or not arising from taxes); *United States v. City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520 (1954) (in dictum: section 3466 imposes an absolute priority in insolvency, but not applied because the record did not establish that the debtor was insolvent); *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071 (1953) (United States tax lien held to have priority under section 3466); *United States v. Security Trust and Savings Bank*, 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53 (1950) (in dictum: section 3466 permits no exception and applies to all debts of the United States whether or not arising from taxes whether or not secured by a lien).

We also are not persuaded by the reasoning of other federal courts that have held that section 3713 provides for absolute priority in tax lien cases for, we believe, those courts did not adequately address the policy considerations weighed in *Kimbell Foods*. *See, e.g., Jonathan's Landing, Inc. v. Townsend*, 960 F.2d 1538 (11th Cir. 1992); *Westmoreland v. Westmoreland, Executrix, and the United States*, 716 F.Supp. 217 (D.S.C. 1988); *Carter v. Carter and T-Cas of America, Inc.*, 681 F.Supp. 323 (E.D. Va. 1988) and *Nesbitt v. U.S.*, 445 F.Supp. 824 (N.D. Cal. 1978).

[18] Since we are construing federal statutes, federal law controls. A state cannot impair the standing of federal liens without the consent of Congress. *United States v. City of New Britain*, 347 U.S. 81, 84, 74 S.Ct. 367, 369, 98 L.Ed. 520, 525 (1954).

[19] Finally, the United States argues that the lien of Romani Industries, Inc. was not sufficiently specific and perfected to displace the first priority of the United States under section 3713. Since this issue was not addressed by the lower courts, it is inappropriate for us to consider it at this time.

statutes. Also, the Tax Lien Act of 1966 evidences a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent. Further, to hold otherwise would frustrate the congressional purpose by defeating in insolvency the very interests that were specifically protected against federal priority in non-insolvency situations. Finally, the grant of absolute federal priority in insolvency cases, as in solvency cases, would be destructive of commercial stability and would frustrate legitimate commercial expectations. We hold, therefore, that section 6323 limits the operation of section 3713 as to tax debts.[19]

Order affirmed.

Messrs. Justice Castille and Nigro concur in the result.

JUDGMENT ENTERED THIS 17TH DAY OF JANUARY, 1997,

/s/ CANDACE FRY
CHIEF CLERK

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 1358 PITTSBURGH 1994

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Cambria County be, and the same is hereby affirmed.

BY THE COURT:

/s/ ELEANOR R. VALECHO
DEPUTY PROTHONOTARY

DATED: May 12, 1995

IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1358 PITTSBURGH 1994

IN RE: ESTATE OF FRANCIS J. ROMANI

v.

APPEAL OF: THE UNITED STATES OF AMERICA

Appeal from the Order
Entered July 7, 1994
in the Court of Common Pleas,
Orphans Division
Cambria County, No. G.D. No. 11-94-14

[MAY 12, 1995]

MEMORANDUM

Before: CAVANAUGH, JOHNSON and SAYLOR, JJ.

This is an appeal by the United States from an order granting appellee's petition to transfer real estate in lieu of execution. We affirm.[1]

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[1] Although there was no order of final distribution in this case, the practical effect of the court's order was to end the administration of the estate by awarding its sole asset to one of the competing creditors. Therefore the order is final and appealable. *Estate of Montgomery*, 367 Pa.Super. 31, 531 A.2d 439 (1987).

Francis J. Romani, the decedent, died on January 13, 1992. Prior to his death, on January 25, 1985, a judgment lien was entered against him in favor of Romani Industries, Inc. in the amount of $400,000. The judgment was entered at No. 1985-205. The judgment was subsequently revived on June 7, 1989. It was entered at No. 1989-1311, and remains unpaid. The sole asset of the decedent's estate is a piece of real estate valued at $53,001. The estate is insolvent, as its debts greatly exceed the value of this sole asset. Subsequent to the entry of judgment against decedent, the Internal Revenue Service filed notice of a federal tax lien against the decedent for unpaid taxes and an unpaid civil penalty, that with interest totaled $489,720.04.

The administrator of the estate filed a petition to transfer real estate in lieu of execution on behalf of the judgment creditor, Romani Industries, Inc. The United States opposed the petition. A hearing was conducted on April 14, 1994, at which time the arguments of counsel were heard.

Romani Industries, Inc. claimed priority pursuant to the Federal Tax Lien Act, 26 U.S.C. §6323(a) which provides that a federal tax lien shall not be valid against a judgment lien creditor until notice thereof has been properly filed.[2] On the other hand, the

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[2] The Federal Tax Lien Act provides in pertinent part:

§ 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) Purchasers, holders of security interests, mechanic's lienors and judgment lien creditors. - The lien imposed by section 6321 [a federal tax lien] shall not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets with the requirements of subsection (f) has been filed by the Secretary. 26 U.S.C. §6323(a).

United States claimed priority pursuant to the Federal Insolvency Statute, 31 U.S.C. §3713(a)(1)(B), which provides that the United States is entitled to first priority among creditors of an insolvent estate.[3]

The court granted the petition, holding that Romani Industries' status as a first in time judgment lien creditor gave it priority over the government's subsequently filed tax lien. The court based its decision, in part, on *In Re Estate of Berretta*, 453 Pa. 441, 426 A.2d 1098 (1981), a case in which an evenly divided plurality of the Pennsylvania Supreme Court held that Section 6323 of the Federal Tax Lien Act impliedly repealed Section 3713 of the Federal Insolvency Statute.[4] The present appeal by the United States follows and requires us to determine which statute should properly be given effect.

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[3] The Federal Insolvency Statute provides in pertinent part:

§ 3713. PRIORITY OF GOVERNMENT CLAIMS.

(a)(1) -a claim of the United States government shall be paid first when-

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all the debts of the debtor.

31 U.S.C. §3713(a)(1)(B).

[4] We are, of course, not bound by this decision, as an equally divided plurality decision has no binding precedential value as a ruling on the merits. *Commonwealth v. Rightnour*, 469 Pa. 107, 364 A.2d 927 (1976); *Commonwealth v. Covil*, 474 Pa. 375, 378 A.2d 841 (1977).

We initially note that since we are construing federal statutes, federal law controls. *See United States v. New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 510 (1953) (a state cannot impair the standing of federal liens without the consent of Congress). The United States Supreme Court has never squarely considered the question whether Section 6323 constitutes an implied exception to the Insolvency Statute. It has, however, had occasion to consider whether other provisions operate as implied exceptions. In so doing, the Court has held that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of [Section 3713 of the Insolvency Statute]." *United States v. Emory*, 314 U.S. 423, 433, 62 S.Ct. 317, 322-23, 66 L.Ed. 315 (1941).

In *United States v. Key*, 397 U.S. 322, 90 S.Ct. 1049, 25 L.Ed 340 (1970), a case cited by the United States to support its argument for priority status, the Supreme Court considered whether a "plainest inconsistency" existed between the Insolvency Statute and Chapter X of the Bankruptcy Act. In deciding that no such inconsistency existed, the Court set forth a three part test to be used in determining whether a "plainest inconsistency" exists sufficient to warrant an implied exception to federal priority in insolvency. Applied to the present case, the test requires that in order to establish the existence of a "plainest inconsistency" between the statutes, it must be demonstrated that 1) the Insolvency Statute and Section 6323 are facially inconsistent; or 2) an unconditional application of the Insolvency Statute would render Section 6323 meaningless; or 3) the legislative history of Section 6323 reflects a Congressional intent to modify the effect of the Insolvency Statute.

The United States argues that none of these three criteria are met, and that, therefore, Section 6323 contains no implied exception to the Insolvency Statute. In particular, the United States argues that, as regards the first prong of the test, the two statutes are not facially inconsistent. It avers:

> Section 3713 and Section 6323 are not facially inconsistent. Section 6323(a) is a lien statute which applies regardless of the solvency of the debtor and protects enumerated third parties from unrecorded federal tax liens when the debtor conveys property. The Federal Insolvency Statute, on the other hand, is a priority statute, not a lien statute, and encompasses all federal claims.

We find this argument unpersuasive. Rather, our review persuades us that both sections clearly address the question of the federal government's *priority as a competing creditor*. Although the Federal Tax Lien Act is undoubtedly a lien statute, Section 6323 thereof clearly addresses the *priority* of federal tax liens against judgment lien creditors. Similarly, the Insolvency Statute addresses the *priority* of all federal claims against other creditors of insolvent debtors. In the present context there can be no dispute that the government's relative priority as a creditor differs depending upon which section is applied. Since this inconsistency between the respective statute sections produces conflicting results, we are constrained to find that the statute sections in question are arguably facially inconsistent, and are, most certainly, conflicting. We therefore turn to

traditional rules of statutory construction to resolve the conflict.

It is a familiar and time honored principle of statutory construction that a conflict between various statutes is to be avoided and if possible the apparent conflicting provisions must be construed together with the more specific provisions prevailing over the general ones. *Townsend v. Little*, 109 U.S. 504, 3 S.Ct. 357, 27 L.Ed. 1012 (1883); *Kepner v. United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *Bulova Watch Co. v. United States*, 365 U.S. 753, 81 S.Ct. 864, 6 L.Ed.2d 72 (1961); *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980). In the case sub judice, Section 6323 is the more specific provision because it applies *only* to federal tax liens, whereas the Insolvency Statute is the more general provision in that it applies to *any* unpaid claim of the government against an insolvent debtor. Therefore, the general provisions of Section 3713 of the Insolvency Statute must be limited by the specific provisions of Section 6323 of the Federal Tax Lien Act. For this reason, we conclude that the court's determination that Romani Industries, Inc. possessed priority over the United States by virtue of its status as a first in time judgment lien creditor was proper.

We affirm the court's grant of Romani Industries Inc's petition to transfer real estate in lieu of execution.

Order affirmed.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION

No. 11-94-14

IN RE: THE ESTATE OF FRANCIS J. ROMANI

APPEARANCES:

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FOR INTERNAL REVENUE SERVICE:
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OPINION AND ORDER

Before: THE HONORABLE THOMAS A. SWOPE, JR., JUDGE OF THE FORTH-SEVENTH JUDICIAL DISTRICT OF PENNSYLVANIA

This matter is before the court on a Petition To Transfer Real Estate In Lieu Of Execution filed by the Administrator of the above captioned estate, on behalf of the creditor, Romani Industries, Inc. The United States opposes the Petition. A hearing was held on April 18, 1994, at which time arguments of counsel were heard. The court grants the Petition.

The facts in this case are not in question. The decedent died on January 13, 1992. Prior to his death, on January 25, 1985 a judgement was entered against the decedent in favor of Romani Industries, Inc. in the amount of $400,000.00. The judgement was entered to No. 1985-205 and was subsequently revived on June 7, 1989, entered to No. 1989-1311. No amount of the judgement has been paid. Romani Industries, Inc. is the first in time judgement lien creditor. The sole known asset of the estate is a piece of real estate located in Portage Borough, valued at $53,001.00. The Internal Revenue Service holds a tax lien, filed after Romani Industries, Inc. perfected its lien. The assets of the estate are completely inadequate to satisfy the debts of the estate.

The issue to be resolved is whether the United States' tax lien has priority over the first in time judgement lien of Romani Industries, Inc. Romani Industries argues it has priority pursuant to the Federal Tax Lien Act, which provides in relevant part:

> (a) Purchases, holders of security interests, mechanic's lienors and judgement lien creditors.—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgement creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary or his delegate. 26 U.S.C. § 6323.

Concomitantly, the United States argues that it has priority by virtue of the Insolvency Statute, which states in pertinent part:

> (a)(1)—a claim of the United States government shall be paid first when—

> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor. 31 U.S.C. § 3713.

This exact issue was addressed in *In re Barretta*, 493 Pa. 441 (1981), in which a plurality of the Supreme Court held that a judgement lien creditor had priority over a federal tax lien where the judgement lien was first in time. The plurality concluded that a plain inconsistency exists between the two statutes. *Id.* at 457. In addition, "the Tax Lien Act evidences a Congressional intent that federal priority be limited in the tax area," whereby the Act impliedly repeals the absolute federal priority of the Insolvency Statute as to tax debts owed to the United States. *Id.* The court reasoned that the United States Supreme Court had restricted federal priority in federal lending cases for reason which are equally applicable in tax lien cases. *Id.* Moreover, "to grant absolute federal priority would be destructive of commercial stability and would frustrate legitimate commercial expectations." *Id.*.

This court adopts the reasoning of the plurality in *Barretta*. As a matter of statutory construction, specific statutory provisions should prevail over conflicting general provisions. *In re Meyer's Estate*, 159 Pa. Super. 296, 305 (1946). The Insolvency Statute is a general mandate for federal priority in insolvency situations. However, the subsequently enacted Tax Lien Act specifically addresses the priority of federal tax liens. In the case sub judice, a different result would be reached depending on whether the Act or the Statute is applied. Faced with this conflict, the Act should be applied because it was enacted to govern tax

debts specifically, whereas the Statute references federal debts generally.

The court finds the argument, advanced by the dissent in *Barretta*, that the an unconditional application of the Insolvency Statute would not preclude the meaningful operation of the Tax Lien Act, untenable. Attempting to fit the Tax Lien Act into the legal gaps in the Insolvency Statute limits the tax lien priorities arbitrarily, so that they bear little relation to the intended scope of the Act. To limit the operation of the Tax Lien exclusively to cases involving solvent tax debtors, would render the lien priorities meaningless, as the issue of priority is moot if the debtor possessed sufficient assets to satisfy all claims. Indeed, the question of lien priorities is significant only when the debtor is insolvent. Consequently, interpreting the Tax Lien Act so as to avoid conflict with the Insolvency Statute would effectively reduce the Act to little more than an academic exercise.

The effect of the Tax Lien Act is to promote commercial stability by assuring members of the favored classes, as set forth in the Act, such as judgement lien creditors, that their legitimate security interests in the property of a debtor will not be disturbed by the existence of an unrecorded federal tax lien. Eliminating this assurance in insolvency cases "would undercut the reliability of the notice filing system, which plays a crucial role in commercial dealings." *Barretta*, 493 Pa. at 455. Otherwise, the fundamental unfairness of denying the unsuspecting and innocent lien holder priority over a subsequent federal tax lien frustrates legitimate commercial expectations, thereby preventing the exercise of reasonable business forethought. The Tax Lien Act by its very language is designed to

protect certain classes of creditors from the reach of later filed tax liens and promote commercial dealings.

ACCORDINGLY THE FOLLOWING ORDER IS ENTERED.

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA
ORPHANS COURT DIVISION

No. 11-94-14

IN RE: THE ESTATE OF FRANCIS J. ROMANI

ORDER

Before: THE HONORABLE THOMAS A. SWOPE, JR., JUDGE OF THE FORTH-SEVENTH JUDICIAL DISTRICT OF PENNSYLVANIA

AND NOW, this 7th day of July, 1994, it is hereby ORDERED and DECREED that the Petition To Transfer Real Estate In Lieu Of Execution is GRANTED.

BY THE COURT

/s/ SWOPE
THOMAS A. SWOPE, JR., JUDGE

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAY 27 1997
CLERK

(2)

No. 96 - 1613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTATE OF FRANCIS J. ROMANI,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF IN OPPOSITION OF ROMANI INDUSTRIES, INC.

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8 pp

QUESTION PRESENTED

In the case of an insolvent estate, when the government holds a tax lien that is subordinate to a private judgment lien under the Tax Lien Act, 26 U.S.C. § 6323(a), is the government nonetheless entitled to priority under the Insolvency Act, 31 U.S.C. § 3713(a)?

PARTIES TO THE PROCEEDINGS

This case involves competing claims to the Estate of Francis J. Romani. The United States contends that it is entitled to the assets of the estate under 31 U.S.C. § 3713(a). Romani Industries, Inc., which holds a judgment lien against the estate, asserts that its lien has priority over the tax lien the United States under 26 U.S.C. § 6323(a). Romani Industries and the United States were the two parties to the proceedings below. *See* Pet. App. 2a-3a. Romani Industries therefore properly is a respondent in this matter, S. Ct. Rule 12.6, and opposes the petition.

Romani Industries has no parent company or nonwholly owned subsidiaries.

By Order, the Clerk of the Court extended the time for filing this Brief in Opposition to and including May 27, 1997.

BRIEF IN OPPOSITION OF ROMANI INDUSTRIES, INC.

BACKGROUND

In January 1985, Romani Industries, Inc. secured a $400,000 judgment lien against the property of Francis Romani. Subsequently, the United States filed a notice of a federal tax lien against the property for approximately $400,000. The tax lien arose as a matter of law under 26 U.S.C. § 6321 from taxes owed by Francis Romani, and also encompassed a civil penalty.

Francis Romani died seven years later, leaving as his entire estate a building worth just over $50,000. The estate's administrator then petitioned the local Court of Common Pleas to transfer title to the building to Romani Industries based on the judgment lien, but the United States entered an opposition, claiming priority under the Insolvency Act of 1797, 31 U.S.C. § 3713(a). That statute provides that a "claim of the United States Government shall be paid first when . . . the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor."

The Court of Common Pleas, however, rejected the United States' claim of priority based on the Tax Lien Act, 26 U.S.C. § 6323(a). That statute provides that a federal tax lien "shall not be valid as against any . . . judgment lien creditor until notice thereof . . . has been filed." Because the government had not filed notice of the tax lien until after Romani Industries had entered its judgment lien, the Court of Common Pleas held that Romani Industries held first-in-time priority to the building. Pet. App. 23a. It therefore approved the transfer of the building to Romani Industries. On appeal by the government, the Superior and Supreme courts of Pennsylvania affirmed. Pet. App. 1a, 15a.

The United States then petitioned for review in this Court.

REASONS FOR DENYING THE WRIT

1. The petition for a writ of certiorari should be denied because it involves only a narrow division in the lower courts, which has existed for thirty years, and which has remained unchanged for seventeen years. The decision below does not make new law in

Pennsylvania, for as Petitioner explains, at 5 n.2, "[t]he Pennsylvania courts have long taken a narrow view of the absolute priority statute" in tax lien cases. Specifically, in 1946 the Pennsylvania Supreme Court held that the Tax Lien Act gives prior liens priority over federal claims brought under the Insolvency Act. *In re Decker's Estate*, 49 A.2d 714 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947). In 1967 and 1980, the Sixth and Ninth Circuits reached the opposite conclusion, the latter by summary ruling. *Kentucky v. United States*, 383 F.2d 13 (6th Cir. 1967);[1] *Nesbitt v. United States*, 622 F.2d 433 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981). No other federal court of appeals has decided this issue.[2]

Petitioner's passing suggestion of a conflict with the Fifth Circuit, Pet. 20 ("see also *Exchange Bank & Trust Co.* v. *Tubbs Mfg. Co.*, 246 F.2d 141 (5th Cir.), cert. denied, 355 U.S. 868 (1957)."), is not correct: the Fifth Circuit has not addressed the question presented by this case. The *Exchange Bank* decision dealt only with *mortgage* liens, which identify specific property and are choate. *See* 246 F.2d at 142 (applying circuit precedent that the Insolvency Act "has no application to a valid, specific and perfected, a fully choate lien"); *accord Southern Ry. v. United States*, 306 F.2d 119, 125 (5th Cir. 1962); *Creditors Exch. Serv. v. United States*, 277 F. Supp. 885, 888-89 (S.D. Tex. 1967) (explaining that *Exchange Bank* held that a "perfected and choate lien defeats federal priority"). Petitioner itself explains, at 10 n.5, that this Court has long held that the

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[1] The Sixth Circuit has not had the opportunity to address whether it would reach a different result in light of the substantial 1966 amendments to the Tax Lien Act, discussed *infra* at 4-5, which "place the older cases in a less persuasive perspective," Pet. App. 12a n.17.

[2] Petitioner appropriately does not allege a conflict between the ruling below and *Jonathan's Landing v. Townsend*, 960 F.2d 1538, 1542 (11th Cir. 1992), *cited in* Pet. App. 12 n.17, which decided the unrelated question whether the Insolvency Act applies when a government lien forces a debtor into bankruptcy.

Insolvency Act does not give the United States priority over mortgage liens.

At bottom, then, Petitioner complains that Pennsylvania's half-century-old rule on the priority of tax liens in insolvency created a conflict beginning with the Sixth Circuit's 1967 ruling in *Kentucky v. United States*, 383 F.2d 13, and ending with the Ninth Circuit's 1980 summary ruling in *Nesbitt*, 622 F.2d 433. The law has remained unchanged for nearly two decades, and Petitioner has presented no ground requiring this Court to intervene now.

2. Certainly, certiorari is not warranted on the ground that the issue is recurring and important, as exemplified by the near absence of relevant appellate rulings. Petitioner admits, at 13 n.7, that the Tax Lien and Insolvency Acts intersect only when (1) property is subject to both a federal lien for a tax debt and a previously perfected lien under state law, and (2) the owner of the property satisfies the particular criteria of the Insolvency Act. This is a very rare circumstance indeed. For example, no district court has published a decision on the question since *Westmoreland v. Westmoreland*, 716 F. Supp. 217 (D.S.C. 1988), and *Carter v. Carter*, 681 F. Supp. 323 (E.D. Va. 1988), nearly a decade ago. And, while Petitioner does identify three state court rulings, *see* Pet. 19-20, only one of those was decided in the past decade, and none was decided by the state's highest court. Moreover, while Petitioner asserts, at 20, that "[t]he question frequently arises in connection with estate proceedings in state courts," it cites only one case for that proposition, *Succession of Nobles*, 684 So. 2d 973 (La. Ct. App. 1996), and that decision never even mentions, much less decides, the merits of this issue. Petitioner's assertions that "[t]he question is frequently raised, frequently litigated and often placed in doubt," Pet. 19, and that the current state of the law "foment[s] recurring and wasteful litigation," Pet. 20, therefore are incorrect.

3. Finally, certiorari is not warranted on the theory that the Pennsylvania Supreme Court misapplied the precedents of this Court. It is settled that a statute creates an implied exception to

the Insolvency Act in any of three circumstances: (1) the statute is "logically inconsistent with the terms of the [Insolvency Act]"; (2) the statute "[would] be rendered redundant if the [Insolvency Act] applied"; or (3) the statute's "language or legislative history reveal a purpose or legislative history incongruous with [the Insolvency Act's] application." *United States v. Key*, 397 U.S. 322, 326 (1970). The Pennsylvania Supreme Court properly concluded that the Tax Lien Act gives prior judgment lienholders priority under either the first or third prongs of that test.

The Insolvency and Tax Lien Acts are logically inconsistent. For two centuries, the Insolvency Act has granted the United States absolute priority in recovering obligations from insolvent debtors. The United States prevailed over all competing creditors no matter whether it had perfected or secured its interest. Congress subsequently provided through the Tax Lien Act that liens securing federal tax debts have *no* priority "as against any . . . judgment lien creditor until notice thereof . . . has been filed." 26 U.S.C. § 6323(a). The duties and obligations of the United States, as well as the rights and priorities of competing creditors, therefore are fundamentally different under the two acts, bringing the Tax Lien Act into conflict with the Insolvency Act.

Moreover, application of the Insolvency Act to assign priority to the United States would defeat Congress' purpose as reflected in the 1966 amendments to the Tax Lien Act, which "specif[ied] priority rules to resolve conflicts between federal tax liens and rival liens." *United States v. Kimbell Foods*, 440 U.S. 715, 721 n.6 (1979). While the amendments do not control this case, Congress in 1966 made clear that the Tax Lien Act was designed to deny unrestricted federal priority over creditors that lacked notice of the federal lien. Thus, "Congress sought to 'improv[e] the status of private secured creditors' and prevent impairment of commercial financing transactions by 'moderniz[ing] . . . the relationship of Federal tax liens to the interests of other creditors.'" *Id.* at 738 (quoting S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966) (alterations in *Kimbell Foods*)). Petitioner, however, would vitiate Congress' purpose by subordinating the

interests of creditors despite the fact that they lack notice of the claim of the United States. "To ignore Congress' disapproval of unrestricted federal priority in an area as important to the Nation's stability as taxation would be inconsistent with" this Court's "function . . . to effectuate congressional policy." *Id.*

Petitioner infers that Congress did not intend the Tax Lien Act to limit the priority of federal tax liens in insolvency from its failure to enact a proposal of the American Bar Association. Pet. 18. But as Petitioner argues in another pending case, "[t]hat alternative bills . . . contained express language [addressing the issue] does not establish that the legislation ultimately passed does not reach such conduct." Br. for the United States, *Paradies v. United States*, No. 96-1346, at 10. Nothing in the legislative record indicates that Congress disagreed with the goal of the ABA proposal, and the failure to adopt it suggests just as plausibly that Congress believed that the statute, as written, already reached that result. Moreover, if Congress *disapproved* of decisions such as Pennsylvania's 1946 ruling in *Decker's Estate*, 49 A.2d 714, it could easily have overturned them when it amended the Tax Lien Act in 1966.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 6 1997
CLERK

No. 96-1613

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Since 1797, Congress has provided that any claim of the United States against an insolvent estate "shall be paid first" (31 U.S.C. 3713(a)). Since 1913, Congress has provided that a federal tax lien is not valid against a judgment lien creditor until notice of the tax lien has been filed (26 U.S.C. 6323(a)).

The question presented in this case is whether a federal tax claim against an insolvent estate is to "be paid first" when a judgment lien arose before the notice of tax lien was filed.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1613

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (Pet. App. 1a-13a) is reported at 688 A.2d 703. The opinions of the Superior Court (Pet. App. 15a-20a) and the Court of Common Pleas (Pet. App. 21a-25a) are not officially reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 17, 1997. The petition for a writ of certiorari was filed on April 10, 1997, and was granted on June 27, 1997. The jurisdiction of this Court rests upon 28 U.S.C. 1257(a).

STATUTES INVOLVED

1. 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

2. 26 U.S.C. 6323(a) provides, in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary.

3. 31 U.S.C. 3713(a) provides, in relevant part:

(1) A claim of the United States Government shall be paid first when—

> (A) a person indebted to the Government is insolvent and—
>
> (i) the debtor without enough property to pay all debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or

> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

STATEMENT

1. On January 25, 1985, a judgment for $400,000 was entered in favor of Romani Industries, Inc., against Francis J. Romani in the Court of Common Pleas of the Commonwealth of Pennsylvania. Romani Industries did not obtain a writ of execution, or otherwise seize any property of the debtor, in satisfaction of the judgment. The judgment remains unpaid (Pet. App. 22a).

After the date of that judgment, the Internal Revenue Service filed notices of federal tax liens on the property of Francis J. Romani. A federal tax lien arises by operation of law in the property of any taxpayer who "neglects or refuses to pay the [tax] after demand" (26 U.S.C. 6321). A notice of the federal tax lien is to be filed in the office "designated by the laws of [the] State, in which the property subject to the lien is situated" (26 U.S.C. 6323(f)). The liens for which notices were filed in this case were for unpaid taxes and penalties totalling approximately $400,000 for the years 1982, 1985, 1987, 1988 and 1989 (Pet. App. 2a).

Mr. Romani died on January 13, 1992. The administrator of his estate sought to transfer the only asset of the estate—real estate having a value of approximately $53,000—to Romani Industries in satisfaction of its outstanding judgment claim. The United States objected to that transfer and filed a proof of claim for federal taxes and interest totalling

approximately $489,000 (Pet. App. 2a). Because the debts of the estate greatly exceed its assets, and the estate is thus insolvent (*ibid.*), the United States claimed first priority for payment of its claim from the assets of the estate under what is known as the "absolute priority" statute. This statute, which was first enacted in 1797 (Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515), was long designated as Section 3466 of the Revised Statutes and is now codified at 31 U.S.C. 3713(a). It provides, in relevant part, that "[a] claim of the United States Government shall be paid first when * * * the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." 31 U.S.C. 3713(a)(1)(B).[1]

Romani Industries contended, however, that the "absolute priority" that Congress has long established for claims of the United States against insolvent estates was impliedly repealed in 1966, for tax claims, by 26 U.S.C. 6323(a). That provision, which was first enacted in 1913 (Act of March 4, 1913, ch. 166, 37 Stat. 1016), provides that the federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary." 26 U.S.C. 6323(a). Romani Industries claimed that, because it became a "judgment lien

[1] Under this "absolute priority" statute, the claims of the United States are also to be paid first when an insolvent debtor "makes a voluntary assignment of property," when property of an absent insolvent debtor is attached, or when "an act of bankruptcy is committed" (31 U.S.C. 3713(a)(1)). In 1978, however, Congress amended the statute to make it inapplicable to bankruptcy cases brought "under title 11" of the United States Code. 31 U.S.C. 3713(a)(2); see note 4, *infra*.

creditor" before notice of the federal tax lien was filed, it is entitled to priority under 26 U.S.C. 6323(a) and that the "absolute priority" rule of 31 U.S.C. 3713 is therefore inapplicable to this case.

2. a. The Court of Common Pleas agreed with Romani Industries that 26 U.S.C. 6323(a) impliedly repealed—for federal tax debts—the absolute priority rule of 31 U.S.C. 3713(a) (Pet. App. 21a-25a). The court did not discuss or cite the several federal decisions that had rejected this interpretation of these federal statutes. See, *e.g.*, *Nesbitt* v. *United States*, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal 1978), cert. denied, 451 U.S. 984 (1981); *Kentucky* v. *United States*, 383 F.2d 13, 14 (6th Cir. 1967). Instead, the court adopted the reasoning of one of the conflicting opinions of the equally-divided court in *In re Estate of Berretta*, 426 A.2d 1098 (Pa. 1981), which concluded that the provisions of 26 U.S.C. 6323(a) evidence a congressional intent to limit the absolute priority otherwise established for the collection of federal claims (Pet. App. 24a).[2] The court stated that this conclusion was supported by the policy concern that application of the "absolute prior-

[2] The Pennsylvania courts have long taken a narrow view of the "absolute priority" statute, in a series of cases that are collected and criticized in Note, *Nesbitt v. United States: Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 753-759 (1984). The opinion from *Estate of Berretta* on which the court chose to rely in this case was criticized by the opposing opinion from the equally-divided court in *Estate of Berretta* because it "transformed its view of what Congress should do into the presumption that Congress has in fact impliedly repealed the Insolvency Statute as to tax liens." *In re Estate of Berretta*, 426 A.2d at 1108 (Roberts, J.).

ity" statute to federal tax claims could "frustrate legitimate commercial expectations" (*id.* at 23a).

b. The Superior Court affirmed (Pet. App. 15a-20a). The court concluded that the governing principle of statutory construction is that an inconsistency between conflicting provisions is to be resolved by allowing the more specific provision to prevail over the more general one (*id.* at 20a). The court stated that 26 U.S.C. 6323(a) is the more specific provision and should therefore prevail over "the general provisions of Section 3713" in any conflict between them (Pet. App. 20a).

The Superior Court acknowledged that this Court has held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command as that of" the absolute priority statute (Pet. App. 18a, quoting *United States* v. *Emory*, 314 U.S. 423, 433 (1941)). The Superior Court concluded, however, that this exacting standard is met—and that the two statutes are "most certainly, conflicting"—because "[i]n the present context * * * the government's relative priority as a creditor differs depending upon which section is applied" (Pet. App. 19a).

c. The Supreme Court of Pennsylvania affirmed (Pet. App. 1a-13a). The court acknowledged that the test applied by this Court in *United States* v. *Key*, 397 U.S. 322 (1970), governs in determining whether 26 U.S.C. 6323(a) impliedly repealed the absolute priority rule of 31 U.S.C. 3713(a) for the collection of tax debts (Pet. App. 5a-6a). In *Key*, the Court stated that an implied repeal of that statute cannot befound unless (i) there is a facial or "logical[] inconsisten[cy]" between the two statutes, (ii) the allegedly conflicting statute would "be rendered

redundant" if the "absolute priority" statute applied or (iii) the "language or legislative history" of the allegedly repealing provision reveals "a purpose incongruous with * * * application" of the absolute priority rule (397 U.S. at 326).

The Pennsylvania Supreme Court determined that the two statutes are facially inconsistent because, "with respect to tax liens, section 6323 provides for a 'first in time' priority while section 3713 gives absolute priority to the United States" (Pet. App. 6a-7a). The court concluded that the history and purpose of Section 6323(a) evidence "a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent" (Pet. App. 13a).[3]

The Pennsylvania Supreme Court stated that its conclusions were reinforced by the rationale of this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, this Court held that, in the absence of any federal statutory directive, the relative priority of private liens and consensual liens that arise from government lending programs is to be determined under

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[3] In reaching that conclusion, the Pennsylvania court did not address the fact that, in enacting the Federal Tax Lien Act (and on one later occasion as well), Congress declined to enact a companion bill that would have repealed application of the "absolute priority" statute to federal tax claims. By contrast, in *Nesbitt* v. *United States*, 445 F. Supp. at 829, the court stated:

> This Court cannot lightly disregard the fact that Congress has been requested on at least two occasions to amend [the absolute priority statute] in a manner which would achieve the result sought here by plaintiff, but it has not yet so amended that section.

nondiscriminatory state laws (440 U.S. at 740). This Court noted in *Kimbell Foods* that commercial transactions are ordinarily formed in reliance upon state commercial law and that a different rule for commercial transactions involving the federal government could upset ordinary business expectations (*id.* at 739). The Pennsylvania Supreme Court recognized that "*Kimbell Foods* involves the priority to be accorded a federal consensual loan where the debtor is solvent, and the case at bar involves the question of the priority to be accorded a federal tax lien where the debtor is insolvent" (Pet. App. 11a). The court nonetheless concluded that the same concerns apply to both cases, for "the grant of absolute federal priority in insolvency cases, as in solvency cases, would be destructive of commercial stability and would frustrate legitimate commercial expectations" (*id.* at 13a).

The Pennsylvania Supreme Court acknowleged that its holding conflicts with the decisions of the "federal courts that have held that section 3713 provides for absolute priority in tax lien cases" (Pet. App. 12a n.17, citing, *e.g.*, *Nesbitt* v. *United States*, *supra*). The court stated, however, that it was "not persuaded by the reasoning of" those decisions (*ibid.*).

SUMMARY OF ARGUMENT

The absolute priority statute has been in force since "the earliest days of the Republic" and gives the United States "priority over all other claimants in collecting debts due it from insolvent debtors" (*United States* v. *Key*, 397 U.S. 322, 324 (1970)). Under this venerable statute, debts owed to the United States by an insolvent estate are to "be paid first" (31 U.S.C. 3713(a)(1)), even when, as in the present case, a competing creditor has a valid and enforceable judgment lien against the property of the estate (*Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396, 425 (1817)).

The Federal Tax Lien Act (26 U.S.C. 6323(a)) did not impliedly repeal application of the absolute priority statute to tax claims of the United States. From its first enactment, the central purpose of the absolute priority statute has been to ensure the collection of taxes from insolvent debtors. The statute contains a "clear * * * command" and "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to [its] operation" (*United States* v. *Key*, 397 U.S. at 324-325).

No such "plain[] inconsistency" exists between the absolute priority statute and 26 U.S.C. 6323(a). The two statutes are logically consistent and address separate concerns. 26 U.S.C. 6323(a) addresses the rights of conflicting lienholders in competition with the federal tax lien. The absolute priority statute, by contrast, applies only to the debts owed by an insolvent to the government, applies "whether or not [those debts are] secured by a lien" and specifies that all such debts must be paid in preference to the claims of others (*United States* v. *Vermont*, 377 U.S. 351, 357 (1964)). An unconditional application of the absolute priority statute would not deprive Section 6323(a) of meaning, for the two statutes operate in different contexts and to different subjects.

The history of Section 6323(a) shows that, in enacting the tax lien provisions, Congress did not intend impliedly to repeal the absolute priority statute. Congress enacted Section 6323(a) in 1966 to expand the classes of private liens that, since 1913, had been protected against unfiled federal tax liens. In doing

so, Congress declined to enact a related proposal that would have repealed application of the absolute priority statute to federal tax claims. Four years later, Congress again declined to enact the same legislative proposal. And, in 1978, when Congress *did* amend the absolute priority statute to make it inapplicable to bankruptcy cases (31 U.S.C. 3713(a)(2)), Congress did not further revise it to make it inapplicable to tax claims. The provisions of the statute thus still contain as "clear a command" as ever (*United States* v. *Key*, 397 U.S. at 325). The statute provides an absolute priority to the United States for tax claims against insolvent estates and "makes no exception in favour of prior judgment-creditors" (*Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) at 425).

The Pennsylvania Supreme Court erred in reasoning that *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), supports a contrary conclusion. *Kimbell Foods* involved "the priority to be accorded a federal consensual loan where the debtor is solvent" and where no federal statutory priority scheme existed (Pet. App. 11a). In that context, this Court adopted state law priority rules to avoid undue disruption of private credit markets (440 U.S. at 734). The Court emphasized in *Kimbell Foods*, however, that federal tax claims implicate a different and specific set of statutory rules and policy concerns and that "the importance of securing adequate revenues * * * justifies the extraordinary priority accorded federal tax liens" (*ibid.*).

The Court has long held, in rejecting similar challenges to application of the absolute priority statute, that any assertion that the statute is "inconvenient" to commercial creditors must be addressed to Con-

gress, not to this Court. *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805). Any objection to the application of the statute based upon its "inconvenience" to other creditors "proves too much" for, "[i]f [that objection] is sound as applied to this kind of a claim of the United States, it is equally sound as applied to all claims as to which the United States" has an absolute priority under 31 U.S.C. 3713(a). *United States* v. *Emory*, 314 U.S. 423, 431 (1941).

ARGUMENT

THE ABSOLUTE PRIORITY THAT CONGRESS ESTABLISHED FOR CLAIMS OF THE UNITED STATES AGAINST INSOLVENT ESTATES WAS NOT IMPLIEDLY REPEALED FOR TAX CLAIMS BY 26 U.S.C. 6323(A)

A. Under The Absolute Priority Statute, All Claims Of The United States Against An Insolvent Estate Are To Be Paid Before Claims Of Other Creditors Are Paid

1. For two hundred years, Congress has provided "an absolute priority for payment of debts due [the United States] from insolvent" debtors (*United States* v. *Key*, 397 U.S. 322, 329 (1970)). "Since the earliest days of the Republic, [31 U.S.C. 3713(a)] and its predecessors have given the Government priority over all other claimants in collecting debts due it from insolvent debtors. The present statute has existed almost unchanged since 1797, and its historical roots reach back to the similar priority of the Crown in England, an aspect of the royal prerogative, founded upon a policy of protecting the public revenues. The same policy underlies the federal statute, *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35 (1832), and it is established

that the terms of [the statute] are to be liberally construed to achieve this broad purpose." *United States* v. *Key*, 397 U.S. at 324 (footnotes omitted). See also *Beaston* v. *Farmers' Bank of Delaware*, 37 U.S. (12 Pet.) 102, 134 (1838).

When first enacted in 1789, the absolute priority statute applied only to customs duties and debts due to the United States on bonds. See Act of July 31, 1789, ch. 5, § 21, 1 Stat. 42. By 1797, however, the absolute priority of the United States was extended to encompass all debts due the government from the estate of an insolvent debtor. See Act of March 3, 1797, ch. 20, § 5, 1 Stat. 515; *United States* v. *Fisher*, 6 U.S. (2 Cranch) at 385. The language of the statute has remained substantially unchanged since that time. See, *e.g.*, Act of March 2, 1799, ch. 22, § 65, 1 Stat. 676; Act of September 13, 1982, Pub. L. No. 97-258, Subtit. III, §1, 96 Stat. 972. In its current formulation, the statute provides that "[a] claim of the United States Government shall be paid first" when "a person indebted to the Government is insolvent" or when "the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." 31 U.S.C. 3713(a)(1).[4]

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[4] Since 1978, the absolute priority statute has expressly been made inapplicable to cases brought under the Bankruptcy Code (31 U.S.C. 3713(a)(2)), which contains a detailed and comprehensive set of priorities applicable to claims of the United States and other parties (11 U.S.C. 507). Prior to enactment of the Bankruptcy Code, the absolute priority statute had been treated separately within the priority provisions applicable to bankruptcy cases under Section 64 of the Bankruptcy Act, 11 U.S.C. 104 (1976). See *United States* v. *Marxen*, 307 U.S. 200, 202-203 (1939).

2. The claim of the United States in the present case for taxes owed by the insolvent estate is entitled to "be paid first" under the plain language of the absolute priority statute.

a. A tax debt owed to the United States is unquestionably a "claim of the United States Government" (31 U.S.C. 3713(a)(1)) within the scope of the broad language of the absolute priority statute. See *Massachusetts* v. *United States*, 333 U.S. 611, 625-626 (1948); *Illinois* v. *United States*, 328 U.S. 8, 9 (1946); *Price* v. *United States*, 269 U.S. 492, 499 (1926). Indeed, from the date of its first enactment to its present form, the most basic function of the statute has been to aid the government in the collection of public revenues. See, *e.g.*, *United States* v. *Key*, 397 U.S. at 324; *United States* v. *Fisher*, 6 U.S. (2 Cranch) at 388. As the Court stated in *United States* v. *Emory*, 314 U.S. 423, 426 (1941):

> The purpose of [the absolute priority statute] is "to secure adequate public revenues to sustain the public burden" (*United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35), and it is to be construed liberally in order to effectuate that purpose (*Bramwell* v. *U.S. Fidelity & Guaranty Co.*, 269 U.S. 483, 487).

b. It is undisputed that the estate involved in this case is insolvent within the meaning of the statute. The estate's debts exceed $489,000, and its sole asset is real estate worth approximately $53,000 (Pet. App. 2a, 22a). Since the estate "in the custody of the executor or administrator, is not enough to pay all debts of the debtor" (31 U.S.C. 3713(a)(1)(B)), the absolute priority statute applies to this case by its plain terms. Under the plain command of the statute, the federal

tax claim is therefore entitled to "be paid first" (31 U.S.C. 3713(a)(1)).

c. It is also well established that the claim of the United States against the insolvent estate is to be paid ahead of the claim of any judgment lienor—such as the private creditor in this case—who has not obtained possession of the disputed property by execution upon its lien. One hundred and eighty years ago, this Court held that the absolute priority statute requires debts owed to the United States to be paid first even when a competing creditor possesses a valid and enforceable judgment lien. In *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396, 425 (1817), as in the present case, the facts fell "precisely within" the scope of the absolute priority statute. The Court stated that (*ibid.*) (emphasis supplied):

> the question still remains * * * whether this right of preference [under the absolute priority statute] can cut out a prior judgment creditor? The law declares, "that in all cases of insolvency, &c., the debts due to the United States shall be first satisfied * * *." *These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity.* * * * *The law makes no exception in favour of prior judgment-creditors; and no reason has been, or, we think, can be, shown to warrant this court in making one.*

The Court concluded in *Thelusson* that, whenever title and possession remain in "the debtor's estate," the claim of the United States is to "be first satisfied" under the statute. *Id.* at 426. As Justice Cardozo explained for the Court more than a century later, "[t]he ruling [in *Thelusson*] was that the

general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the [absolute priority] statute unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. 290, 293-294 (1933). Accord, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); *United States* v. *Texas*, 314 U.S. 480, 485-486 (1941); *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) 386, 441-443 (1828).[5]

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[5] This Court has "repeatedly reserved the question whether the priority given the United States by [Revised Statutes] § 3466 can be overcome even by a prior specific and perfected lien." *United States* v. *Vermont*, 377 U.S. 351, 358 n.8 (1964). The Court has never decided the issue because it has found, in each case, that the competing lien had not divested the debtor of title or possession and that the lien was therefore not sufficiently specific to raise the issue squarely. See, *e.g.*, *ibid.*; *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 365-366 (1953); *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 370 (1946); *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355-356 (1945); *United States* v. *Texas*, 314 U.S. 480, 484-486 (1941); *New York* v. *Maclay*, 288 U.S. 290, 294 (1933); *Spokane County* v. *United States*, 279 U.S. 80, 95 (1929).

The Court has concluded that a mortgage may effect a transfer of title, taking the property outside the estate of the debtor and therefore beyond the reach of the absolute priority statute. See *Conard* v. *Atlantic Insurance Co.*, 26 U.S. at 445-446. In so ruling, the Court did "not contemplate that exceptions were being made" from the absolute priority statute; instead, it "conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor" (*Massachusetts* v. *United States*, 333 U.S. at 634 n.38). The Court "has been loath to expand" such an exception "to include other types of lien" (*ibid.*). The

The judgment creditor took no such action to obtain possession of the disputed property before the government's claim arose in this case (Pet. App. 2a). The "words [of the absolute priority statute], taken in their natural and usual sense, * * * embrace the case before the court" and thus "plainly give the United States the preference they claim" (*United States* v. *Fisher*, 6 U.S. (2 Cranch) at 385-386).

B. The Federal Tax Lien Act Does Not Repeal The Absolute Priority Of Tax Claims Of The United States Against Insolvent Estates

The Supreme Court of Pennsylvania acknowledged that the plain language of the absolute priority statute applies directly to this case (Pet. App. 6a). The court concluded, however, that the absolute priority created for claims of the United States by that statute had been impliedly repealed—for tax claims—by the enactment of the Federal Tax Lien Act of 1966, 26 U.S.C. 6323(a). The latter statute provides that the federal tax lien that arises by operation of law when a taxpayer neglects to pay an assessment (26 U.S.C. 6321) is not valid against private lien holders (including judgment lien creditors) until notice of the tax lien has been filed.

In concluding that Congress impliedly repealed application of the absolute priority statute to federal tax claims, the Pennsylvania Supreme Court failed to follow this Court's admonition that "[o]nly the plainest inconsistency would warrant * * * finding

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Court has emphasized that none of its decisions lends "support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien" (*United States* v. *Texas*, 314 U.S. at 486).

an implied exception to the operation" of the absolute priority statute (*United States* v. *Key*, 397 U.S. at 324-325).

1. During the long history of the absolute priority statute, this Court has frequently addressed claims of the type presented by respondent in this case. As long ago as 1805, in the earliest of these cases, the Court rejected the claim of a creditor who, while acknowledging (as respondent does in this case) that the absolute priority statute, by its terms, confers priority on the United States, nonetheless argued that Congress had, in some manner apart from the text of the statute, evidenced "an intent varying from that which the words import." *United States* v. *Fisher*, 6 U.S. (2 Cranch) at 386. Chief Justice Marshall made clear in his opinion for the Court in that case that, because the statute is "explicit" in providing priority to the United States (*id.* at 389), any creditor who seeks to establish an implied exception from the absolute priority statute bears a heavy burden. *Id.* at 386. See also *Beaston* v. *The Farmers' Bank of Delaware*, 37 U.S. (12 Pet.) at 134.

Applying that same reasoning, the Court has consistently emphasized in numerous subsequent cases that the absolute priority statute "on its face permits no exception whatsoever" (*United States* v. *Vermont*, 377 U.S. 351, 357 (1964); see also, *e.g.*, *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 355 (1945)) and that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command as that of [the absolute priority statute.]" *United States* v. *Emory*,

314 U.S. at 433.[6] See also *United States* v. *Moore*, 423 U.S. 77, 82-83 (1975).

Most recently, the Court held in *United States* v. *Key*, 397 U.S. at 332, that the absolute priority statute "must apply according to its terms except where expressly superseded, or where excluded by a later enactment 'plainly inconsistent' with it." The Court concluded in *Key* that such a "plain[] inconsistency" could be said to exist only if (i) the competing statute is logically inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would deprive the competing statute of any meaning; or (iii) the history and text of the competing statute reflect an actual intent by Congress to modify the absolute priority statute (397 U.S. at 324-326; see also *id.* at 321-332).[7]

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[6] In *United States* v. *Emory*, 314 U.S. at 433, the Court rejected the contention that Section 64 of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, which gave certain wage claimants priority over claims of the United States in bankruptcy cases, impliedly repealed application of the absolute priority statute to *non*bankruptcy cases. The Court held that the express alteration of the priority applicable in bankruptcy cases did not implicitly repeal application of the absolute priority statute to insolvencies outside of bankruptcy court (314 U.S. at 427):

> Neither the language of § 64(a) nor the Congressional history of the legislation here involved supports the proposition that § 64(a) was intended to eliminate, either partially or wholly, the priority of claims of the United States in non-bankruptcy proceedings.

See also *Massachusetts* v. *United States*, 333 U.S. 611 (1948).

[7] In *United States* v. *Key*, 397 U.S. at 332, the Court concluded that the provisions of what was then Chapter X of the Bankruptcy Act—which required "fair and equitable" treatment of creditors in a reorganization—were not "plainly inconsistent" with the absolute priority statute and did not impliedly repeal its application in such proceedings. The Court stated that "the statute literally applies, and no plain inconsistency with the scheme of Chapter X appears." *Ibid.*

2. The standard adopted by the Court in *Key* to evaluate claims of an implied repeal of the absolute priority statute is not satisfied in this case.

a. There is no logical inconsistency between the Federal Tax Lien Act and the absolute priority statute. The two statutes differ in their scope and address different concerns. The absolute priority statute governs the priority of claims of the United States only in insolvencies outside of bankruptcy court (see 31 U.S.C. 3713(a)(2)). By contrast, 26 U.S.C. 6323(a) governs the validity of the federal tax lien against specific types of security interests in cases involving solvent debtors and also in the many insolvency situations to which the absolute priority statute is inapplicable. This Court has long noted that Congress has intentionally chosen to establish greater protection for the United States in cases involving insolvent debtors than in cases "[w]here the debtor is not insolvent." *United States* v. *Vermont*, 377 U.S. at 358. See also *United States* v. *Key*, 397 U.S. at 329; *United States* v. *City of New Britain*, 347 U.S. 81, 85 (1954).

26 U.S.C. 6323(a) is concerned with the rights of conflicting lienholders in competition with the federal tax lien. The absolute priority statute, by contrast, applies only to the debts owed by an insolvent and applies "whether or not [those debts are] secured by a lien" (*United States* v. *Vermont*, 377 U.S. at 357). In the first case arising in this Court under the absolute priority statute, the Court explained that "no *lien* is

created by this law. * * * It is only a priority in payment * * * and this priority is limited to a particular state of things" (*United States* v. *Fisher*, 6 U.S. (2 Cranch) at 390).

As the Sixth Circuit has explained, the two statutes focus on different concerns, operate in different contexts, and are not logically inconsistent (*Kentucky* v. *United States*, 383 F.2d 13, 14-15 (1967)):

> We at once emphasize that of the statutes involved, one * * * is a priority statute, and the other—26 U.S.C. § 6323—is a lien statute. If we employ a literal reading of [the absolute priority statute], its language provides the answer to the question before us. We requote it for emphasis:
>
> > "*Whenever* * * * the estate of any deceased debtor, in the hands of the executors or administrators, *is insufficient to pay all the debts due from the deceased*, the debts due to the United States *shall be first satisfied.*
>
> The essentials for application of the statute are here present—the taxpayer is deceased; he was a debtor of the United States; his estate is insufficient to pay all his debts. Present these essentials, the debts owing the United States "shall be first satisfied."

The Ninth Circuit reached the same conclusion in *Nesbitt* v. *United States*, 622 F.2d 433 (1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied, 451 U.S. 984 (1981). The court noted that the absolute priority statute (445 F.Supp. at 829-830, adopted by reference, 622 F.2d at 433):

> grants a first priority to the Government as a creditor; [Section 6321] creates a lien on 'all the property' of a delinquent taxpayer. The [absolute] priority is not a lien; it covers all debts to the Government; it is available only in the case of an insolvent debtor whose property has passed to a third person—other than a trustee in bankruptcy —for the benefit of creditors; and it arises at the time of this transfer. The [Section 6321] tax lien covers only tax debts; it arises regardless of the solvency of the taxpayer; and it attaches at the time the assessment list is received by the collector.

Justice Whittaker expressed the same views in his concurring opinion in *James* v. *United States*, 366 U.S. 213 (1961), in which he concluded that the absolute priority statute remains applicable to tax claims notwithstanding the restrictions imposed on enforcement of the federal tax lien. He stated that, "even though the tax claim of the Government may be only a general lien, with notice thereof not yet filed in the proper local office pursuant to 26 U.S.C. § 6323, we have held that it must be accorded priority over the claims of all prior general lienholders" and it therefore has priority in insolvency cases "over the claims of others, including 'judgment creditors.'" 366 U.S. at 252 & n.4.

b. An unconditional application of the absolute priority statute would not deprive 26 U.S.C. 6323 of meaning. Section 6323 determines the effectivenesss of federal tax liens against other types of liens and, as this Court has noted, does "not attempt to give priority in all cases" to the federal lien. *United States* v. *City of New Britain*, 347 U.S. at 84. As this Court explained in *City of New Britain*, however, Congress *has* determined to give first priority to the

tax claims of the United States against insolvent estates in the absolute priority statute (*id.* at 85):

> When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, whether secured by liens or otherwise, by [what is now 31 U.S.C. 3713(a)]. In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an absolute priority.

As this Court noted in *City of New Britain*, the provisions of Section 6323 do not govern the relative rights of lien creditors in cases involving insolvents. The rights of creditors in cases involving insolvents are governed instead by the absolute priority statute. 347 U.S. at 85. The Court expressed the same conclusion in *United States* v. *Vermont*, 377 U.S. at 358, in which it explained that whether the government has a tax lien, and whether that lien would have priority under Section 6323, is irrelevant in cases to which the absolute priority statute applies: the government's priority in insolvencies is based merely on whether the government has a "claim" (37 U.S.C. 3713(a)) and applies "whether or not [that claim is] secured by a lien" (*United States* v. *Vermont*, 377 U.S. at 357).

The two statutes thus have different areas of concern and different objectives. Section 6323 applies to situations involving solvent debtors and also to the insolvency situations to which the absolute priority statute is inapplicable. The absolute priority statute applies only to insolvencies manifested in one of the modes specified in 31 U.S.C. 3713(a)—to cases in which the estate of a debtor is insolvent, cases in

which the debtor makes a voluntary assignment of his property or commits an act of bankruptcy and cases in which the property of an absent debtor is attached.[8] 31 U.S.C. 3713(a)(1). See *United States* v. *Fisher*, 6 U.S. (2 Cranch) at 390; note 1, *supra*. As this Court stated in *United States* v. *Oklahoma*, 261 U.S. 253, 260 (1923):

> Mere inability of the debtor to pay all his debts in ordinary course of business is not insolvency within the meaning of the act, but it must be manifested in one of the modes pointed out in the latter part of the statute which defines or explains the meaning of insolvency referred to in the earlier part. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35; *United States* v. *Fisher*, 2 Cranch, 358, 390; *United States* v. *Hooe*, 3 Cranch, 73, 90; *Prince* v. *Bartlett*, 8 Cranch, 431, 433; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 439;

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[8] The term "act of bankruptcy" is not defined in the absolute priority statute but has been held to incorporate the definition of that term contained in the Bankruptcy Act of 1898, ch. 541, § 3(a)(5), 30 Stat. 546 (11 U.S.C. 21(a)(5) (1976)). See *Jonathan's Landing, Inc.* v. *Townsend*, 960 F.2d 1538, 1540 (11th Cir. 1992); *Carter* v. *Carter*, 681 F. Supp. 323, 326 n.13 (E.D. Va. 1988). Under the Bankruptcy Act of 1898, the term "act of bankruptcy" includes such actions by a debtor as fraudulent conveyances and preferential transfers. 11 U.S.C. 21 (a)(1) and (2) (1976).

The current Bankruptcy Code abolished the concept of "acts of bankruptcy" and does not contain a definition of that term. *Jonathan's Landing, Inc.* v. *Townsend*, 960 F.2d at 1543 n.20; S. Rep. No. 989, 95th Cong., 2d Sess. 34 (1978). Although the concept of an act of bankruptcy is no longer applied in bankruptcy law, it remains a part of the absolute priority statute. 31 U.S.C. 3713(a)(1)(a)(iii); see *Carter* v. *Carter*, 681 F. Supp. at 326 n.13.

Brent v. *Bank of Washington*, 10 Pet. 596, 611; *Field* v. *United States*, 9 Pet. 182, 201.

The two statutes also operate with different force in the contexts to which they apply. In order to defeat an unfiled federal tax lien under Section 6323, the competing lien must be "choate"—the identity of the lienor, the property subject to the lien, and the amount of the lien must be established. *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 89 (1963); *United States* v. *City of New Britain*, 347 U.S. at 84. Different standards apply under the absolute priority statute. Under the latter statute, a competing claimant can defeat the federal claim, if at all, only by obtaining title to or possession of the debtor's property before the right of preference accrued to the United States. *United States* v. *Vermont*, 377 U.S. at 357-358; *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) at 425. See note 5, *supra*. An unconditional application of the absolute priority statute does not disturb application of Section 6323 in the contexts to which the latter applies and thus does not render that statute meaningless.

c. The history of 26 U.S.C. 6323 shows that, in enacting the tax lien provisions, Congress did not intend impliedly to repeal the absolute priority statute. Beginning in 1866, Congress established a federal tax lien upon all property owned by a delinquent taxpayer. See 26 U.S.C. 6321; Act of July 13, 1866, ch. 184 § 9, 14 Stat. 98. In response to a decision of this Court holding that an unrecorded tax lien had priority in a delinquent taxpayer's property even over a purchaser for value without notice (*United States* v. *Snyder*, 149 U.S. 210 (1893)), the statute was amended in 1913 to make the tax lien ineffective against a

mortgagee, purchaser or judgment creditor whose interests arose before notice of the tax lien was filed. Act of March 4, 1913, ch. 166, 37 Stat. 1016. The language of the 1913 statute has been carried forward in numerous revenue acts and now appears as Section 6323(a) of the Internal Revenue Code, 26 U.S.C. 6323(a). The protection established for a judgment lien creditor (such as the private creditor in this case) from an unfiled federal tax lien has thus existed since 1913.

In 1966, Congress determined to give similar protection to additional types of secured transactions. The Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, amended the statute to protect holders of various commercial security interests from an unfiled tax lien. See H.R. Rep. No. 1884, 89th Cong., 2d Sess. 1-2 (1966) (1966-2 C.B. 815, 815-816); S. Rep. No. 1708, 89th Cong., 2d Sess. 1-2 (1966) (1966-2 C.B. 876, 876-877).[9] The legislative history of that Act reflects that these amendments to the tax lien statute were *not* intended to repeal or modify the absolute priority statute. Indeed, Congress declined to enact proposals that were made at that very time for that very purpose.

In proposing the legislation that resulted in the Federal Tax Lien Act, the American Bar Association also proposed that the absolute priority statute be amended to subject that statute to the priorities established under the Bankruptcy Act and the Internal Revenue Code. See American Bar Associa-

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[9] In 1939, the successor of the 1913 statute had been amended similarly to include protection from the unfiled federal tax lien for the holders of a pledge. Revenue Act of 1939, ch. 247, § 401, 53 Stat. 882.

tion, *Final Report of the Committee on Federal Liens* 7, 124 (1959) (*Final Report*), contained in *Hearings on the Priority of Federal Tax Liens and Levies Before the House Comm. on Ways and Means*, 89th Cong., 2d Sess. at 85, 199 (1966) (House Hearings).[10] The ABA proposal and report were submitted to Congress, and three bills were introduced containing this proposed revision of the absolute priority statute. *House Hearings*, *supra*, at 75-88, 196-201. When the Federal Tax Lien Act was enacted, however, the bills proposing amendments to the absolute priority statute died in committee. See 105 Cong. Rec. 1030, 1258 (1959) (Index). This history is plainly inconsistent with the conclusion of the Pennsylvania Supreme Court in this case that "the Tax Lien Act of 1966 evidences a congressional intent that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent" (Pet. App. 13a).

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[10] The ABA's proposed amendment would have specified that nothing in the absolute priority statute "shall impair * * * any other valid lien or security interest which would have been entitled to priority over the claim of the United States immediately preceding such divestment." *Final Report*, *supra*, at 122. The purpose of the proposed amendment, which Congress declined to enact, was to "preserve, ahead of the priority of non-lien federal claims, any non-federal lien or security that would have been entitled to priority over the claim of the United States immediately prior to the divestment of the debtor's property" and to "assure, contrary to the suggestions made in some decisions, that any lien which would qualify for priority in the absence of insolvency would continue to enjoy such priority." *Final Report*, *supra*, at 124. Under the ABA's proposal, the order of priorities specified in 26 U.S.C. 6323(a) would have been applicable in all insolvency situations.

The subsequent history of related legislation confirms that Congress did not intend impliedly to repeal the absolute priority statute. In 1970, the ABA again submitted to the Senate Judiciary Committee a proposed amendment to the absolute priority statute that would have repealed its application to tax claims. S. 2197, 92d Cong., lst Sess. (1971); see William T. Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 9-10 (1971). This bill also died in committee.

In enacting the Federal Tax Lien Act and again four years later, Congress thus declined to adopt proposed legislation that would have made the absolute priority statute inapplicable to tax claims. In view of this history of congressional rejection of such proposals, respondent cannot satisfy its burden of demonstrating a "manifestation of congressional intent" that "implies such an exception" was intended (*United States* v. *Key*, 397 U.S. at 324). As the Ninth Circuit correctly concluded in *Nesbitt* v. *United States*, 445 F. Supp. at 828, adopted by reference 622 F.2d at 433:

> There is nothing in either the language or the legislative history of [26 U.S.C. 6323] to indicate that Congress intended to make tax liens the federal government's sole remedy for the collection of unpaid taxes. To the contrary, Congress intended tax liens to supplement existing means for the collection of taxes, including [the absolute priority statute]. There is, therefore, no basis for saying that Congress, by creating federal tax liens, intended to modify [the absolute priority statute] in any way.

The fact that Congress twice declined proposals to remove tax claims from the absolute priority statute, while enacting related legislation, demonstrates that Congress did *not* intend to modify that statute. *Nesbitt* v. *United States*, 622 F.2d at 433, aff'g 445 F. Supp. at 829:

> This Court cannot lightly disregard the fact that Congress has been requested on at least two occasions to amend [the absolute priority statute] in a manner which would achieve the result sought here by plaintiff, but it has not yet so amended that section.

Accord, *Estate of Silberman*, 46 Cal. Rptr. 610, 615 (Ct. App. 1995) ("The fact that [C]ongress was twice presented with proposals to accomplish this end, and did not adopt them strongly supports the inference that it was informed of the policy considerations in favor of such legislation and nevertheless declined to amend the [absolute priority statute]."). Cf. *Miner* v. *Atlass*, 363 U.S. 641, 651 (1960) ("We do not think this failure to enact the proposed amendments can be explained away by suggesting that * * * amendment of the General Rules [was thought] unnecessary.").

Over the last two hundred years, Congress has frequently amended, codified and recodified the absolute priority statute. Indeed, it has done so twice since the Federal Tax Lien Act of 1966 was enacted. In 1978, Congress amended the absolute priority statute to make it inapplicable to bankruptcy cases. 31 U.S.C. 3713(a)(2); note 4, *supra*. And, in 1982, Congress recodified the absolute priority statute to make minor revisions in its terminology. See Act of September 13, 1982, Pub. L. No. 97-258, Subtit. III, § 1, 96 Stat. 972. In doing so, however, Congress emphasized that

no substantive change in the law was intended. H.R. Rep. No. 651, 97th Cong., 2d Sess. 2-3 (1982).

Congress has never modified the absolute priority statute to eliminate its application to federal tax claims. By recodifying the absolute priority statute in 1978 and 1982 without making the twice-proposed change in its application to tax claims, Congress reaffirmed the broad and "clear * * * command" of the statute (*United States* v. *Key*, 397 U.S. at 325). The words that Congress has employed in the absolute priority statute remain "broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States" (*United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. at 355).

d. Under the standards applied by this Court in *United States* v. *Key*, 397 U.S. at 324-326, (i) Section 6323 of the Internal Revenue Code is not inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would not make Section 6323 meaningless; and, (iii) the history and text of Section 6323 and the absolute priority statute do not reflect an intent by Congress to modify the latter statute. The "plainest inconsistency" that would be required for this Court to find an implied exception to the operation of the absolute priority statute thus does not exist (*United States* v. *Key*, 397 U.S. at 325). Instead, as this Court has observed on several occasions, the statute contains as "clear a command" now as ever (*ibid.*) and the asserted "inconsistency is wholly wanting here" (*United States* v. *Emory*, 314 U.S. at 433).

3. a. The Pennsylvania Supreme Court erred in relying on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), as guidance "on the policy considerations that underlie the question of whether the

government in the tax arena is to be treated as an ordinary creditor or as a creditor with super-priority" (Pet. App. 7a). The *Kimbell Foods* case did not involve federal tax claims; nor did it involve insolvent debtors. Instead, it involved "the priority to be accorded a federal consensual loan where the debtor is solvent" and where no federal statutory priority scheme existed (*Id.* at 11a). In *Kimbell Foods*, in the absence of any applicable federal statutory scheme, the Court adopted the state law priority rules "on which private creditors base their daily commercial transactions" in order to avoid undue disruption of private credit markets. 440 U.S. at 729. The Court concluded, in the absence of any "congressional directive," that the relative priority of private liens and consensual liens arising from government lending programs should be determined under non-discriminatory state laws. *Id.* at 740.

In *Kimbell Foods*, however, the Court expressly noted that an entirely different set of statutory rules and policy concerns becomes applicable when the government is collecting taxes as an involuntary creditor of a taxpayer (440 U.S. at 734):

> That collection of taxes is vital to the functioning, indeed existence, of government cannot be denied. * * * The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. By contrast, when the United States operates as a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to invoke protective measures against defaulting debtors in a manner disruptive of existing credit markets.

As an involuntary creditor of delinquent taxpayers, the government cannot "control the factors that make tax collection likely." *Id.* at 736. As a consensual lender, however, the government acts "voluntarily, with detailed knowledge of the borrower's financial status" and "[b]y carefully selecting loan recipients and tailoring each transaction with state law in mind," it can "establish[] terms that will secure repayment" (*ibid.*).

Recognizing the significant difference between federal tax liens and the consensual liens created by government loan programs, the Court stated that "'[a]s a quasi-commercial lender, [the government] does not require * * * the special priority which it compels as sovereign' in its tax-collecting capacity." 440 U.S. at 737-738, quoting *Kimbell Foods, Inc.* v. *Republic Nat'l Bank of Dallas*, 557 F.2d 491, 500 (5th Cir. 1977). The Pennsylvania Supreme Court thus plainly erred in relying on *Kimbell Foods* in determining the scope of the priority created by statute for the collection of non-consensual debts owed by insolvent debtors to the United States "in its tax collecting capacity" (440 U.S. at 738).

The Pennsylvania Supreme Court also erred in concluding that the court should fashion an implied exception from the absolute priority statute for tax claims in order to protect the "legitimate commercial expectations" of other creditors (Pet. App. 13a). The absolute priority statute has been in force for two hundred years, and the proper balance to be achieved between the interests of the United States and other

creditors is a matter for Congress, not the courts, to determine (*Nesbitt* v. *United States*, 445 F. Supp. at 830, adopted by reference, 622 F.2d at 433 (footnotes omitted)):

> The Court is not unmindful of the many policy reasons why the government should not be entitled to priority under [the absolute priority statute] when it is not entitled to priority under the [Federal Tax Lien Act]. However persuasive these policy reasons may be, they do not convince the Court that the [Federal Tax Lien Act] is plainly inconsistent with [the absolute priority statute]. Plaintiff's remedy, if there is to be a remedy, must come from Congress and not the courts.

See also *Estate of Silberman*, 46 Cal. Rptr. 2d at 615.

From its earliest decision under this statute, the Court has consistently held that any assertion that the statute is "inconvenient" to commercial creditors must be addressed to Congress, rather than to the courts. As Chief Justice Marshall explained for the Court in *United States* v. *Fisher*, 6 U.S. (2 Cranch) at 390:

> [I]t would be going a great way to say that a constrained interpretation must be put [on the absolute priority statute], to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.
>
> * * * It is for the legislature to appreciate [such inconveniences]. They are not of such magnitude as to induce an opinion that the legislature could not intend to expose the citizens of the United States to them, when words are used which manifest that intent.

Moreover, as the Court emphasized in *United States* v. *Emory*, 314 U.S. at 431, any objection to the application of the statute based upon its "inconvenience" to other creditors simply "proves too much." "If [that objection] is sound as applied to this kind of a claim of the United States, it is equally sound as applied to all claims as to which the United States" has been given an absolute priority under 31 U.S.C. 3713(a). 314 U.S. at 431. "[W]hatever may be the merits of the contention, it should be addressed to Congress and not to this Court." *Ibid.*

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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AUGUST 1997

(4)

No. 96-1613

Supreme Court, U.S.
FILED
OCT 6 1997
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTATE OF FRANCIS J. ROMANI,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT ROMANI INDUSTRIES, INC.

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QUESTION PRESENTED

Whether 31 U.S.C. § 3713(a), which creates priority but not security for any federal government claim against the estate of an insolvent debtor, is controlling for a government tax claim where (i) a competing creditor is secured by a judgment lien on the debtor's real property and (ii) the Federal Tax Lien Act of 1966, 26 U.S.C. § 6323(a), specifically provides that the lien securing the tax claim "shall not be valid" against that creditor.

PARTIES TO THE PROCEEDINGS

The parties below were the United States, Romani Industries, Inc., and the Estate of Francis J. Romani. Although the United States has captioned the case as *United States v. Estate of Francis J. Romani*, Romani Industries is a proper respondent by operation of this Court's Rule 12.6.

Romani Industries has no corporate parent or subsidiaries.

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STATUTES INVOLVED

The federal priority statute, as amended, 31 U.S.C. § 3713(a), and relevant portions of the Federal Tax Lien Act of 1966, as amended, 26 U.S.C. §§ 6321-6327, appear in their entirety in an appendix to this brief.

STATEMENT OF THE CASE

The Federal Tax Lien Act of 1966, which secures federal tax claims and comprehensively governs their priority, provides that a federal tax lien "shall not be valid" against a first-in-time judgment lien creditor. 26 U.S.C. § 6323(a). This case presents the question whether a federal tax claim nonetheless may prevail against a first-in-time judgment lien creditor by operation of 31 U.S.C. § 3713(a), which creates no security interest at all, but which affords a priority for all federal government claims against insolvent debtors. Without dissent, the three courts below held that the specific provisions of the Tax Lien Act prevail over the general provisions of the federal priority statute. Accordingly, they concluded that the secured judgment held by respondent Romani Industries must be satisfied before the unsecured tax claim held by the government.

1. On January 25, 1985, respondent Romani Industries, Inc. recorded a $400,000 judgment against Francis J. Romani in the clerk's office of the Court of Common Pleas for Cambria County, Pennsylvania. Pet. App. 21a-22a. Under Pennsylvania law, the recording of that judgment created a lien on all of the real property owned by Mr. Romani in Cambria County. 42 Pa. Cons. Stat. Ann. Section 4303(a).[1] Pennsylvania law treats such

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[1] In pertinent part, Section 4303(a) provides:

> Any judgment or other order of a court of common pleas for the payment of money shall be a lien upon real property . . . when it is entered of record in the office of the clerk of the court of common pleas of the county where the real property is situated, or in the office of the clerk of the branch of the court of common pleas

a judgment lien as a mature property interest fully entitled to federal and state constitutional protection. *See In re Upset Sale*, 479 A.2d 940, 943-44 (Pa. 1984). In particular, it defines judgment liens as "no less property interests" than mortgages. *See id.* at 944.

After Romani Industries obtained its judgment lien, the Internal Revenue Service filed notices of federal tax liens, for an amount totalling approximately $490,000, on the property of Mr. Romani. Pet. App. 2a. Those liens arose under the Federal Tax Lien Act of 1966, which provides that if any person refuses to pay a tax "after demand" by the IRS, the unpaid amount constitutes a lien in favor of the United States on all of that person's real and personal property, wherever located. 26 U.S.C. Section 6321, App. 2a.[2] The Tax Lien Act also comprehensively regulates the priority of these tax liens against competing claims and interests. Most relevant here, it provides that a lien imposed under Section 6321 "shall not be valid" against four categories of competing claimants — "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" — until notice of the lien has been publicly filed in an office designated by the State where the encumbered property is located. 26

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embracing such county.

[2] Section 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321. The next section of the Tax Lien Act confirms that this lien arises "at the time the assessment is made" by the IRS. *Id.* § 6322.

U.S.C. § 6323(a), App. 2a.[3] The Tax Lien Act further provides that a lien imposed under Section 6321 "shall not be valid" against ten other categories of interests even after notice of the lien has been so filed. 26 U.S.C. § 6323(b), App. 2a-5a. The Act further provides special protection for certain elaborately defined "commercial transactions financing agreements." 26 U.S.C. § 6323(c), App. 5a-9a. The Act also specifically defines many of the other protected security interests. 26 U.S.C. § 6323(h), App. 14a-15a. And it provides an entirely distinct set of liens and priorities for various estate and gift taxes. 26 U.S.C. §§ 6324, 6324A, 6324B, App. 17a-24a.

When Mr. Romani died in 1992, he left as his entire estate a piece of real property located in Cambria County and valued at approximately $53,000. Pet. App. 2a. The property remained encumbered both by Romani Industries' judgment lien and by the government's federal tax lien. *Id.* The administrator of the estate filed a petition in the Court of Common Pleas for Cambria County to transfer the property to Romani Industries in lieu of execution, on the ground that the Tax Lien Act expressly invalidated the government's tax lien as against Romani Industries' first-in-time judgment lien, and that Romani Industries' secured claim therefore prevailed as against the government's unsecured claim. The government opposed the motion under 31 U.S.C. § 3713(a), App. 1a, which the government characterizes as an "absolute priority statute" (Pet. Br. *passim*), but which this Court has more modestly described as simply the "priority

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[3] Section 6323(a) provides that "[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary" of the Treasury. App. 2a. Section 6323(f)(1), in turn, provides in pertinent part that the notice shall be filed in an office designated by the state "in which the property subject to the lien is situated." App. 10a-11a. Section 6323(f)(2) provides that real property is situated "at its physical location" and that personal property is deemed to be situated "at the residence of the taxpayer" when the notice is filed. App. 11a.

statute," *e.g.*, *Department of the Treasury v. Fabe*, 508 U.S. 491, 493 (1993); *United States v. Moore*, 423 U.S. 77, 81 (1975). In pertinent part, Section 3713(a) provides that a federal claim "shall be paid first" when the estate of a deceased debtor is "insolvent" in the sense that its assets are "not enough to pay all debts of the debtor."[4]

2. The court of common pleas granted the motion to transfer the real property to Romani Industries. The court acknowledged the conflict in this case between the Tax Lien Act, which would give priority to Romani Industries' first-in-time judgment lien, and Section 3713(a), which would give priority to the government's claim against an insolvent estate. Pet. App. 23. Citing the prior Pennsylvania decisions in *In re Estate of Berretta*, 426 A.2d 1098 (Pa. 1981), and *In re Meyer's Estate*, 48 A.2d 210 (Pa. Super. Ct. 1946), and the principle of statutory construction that "specific provisions should prevail over conflicting general ones," the court concluded that the priority provisions of the Tax Lien Act, which were "enacted to govern tax debts specifically," must prevail over the federal priority statute, which "references federal debts generally." Pet. App. 23a-24a.

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[4] In its entirety, the federal priority statute provides:

> (1) A claim of the United States Government shall be paid first when —
>
> (A) a person indebted to the Government is insolvent and —
>
> (i) the debtor without enough property to pay the debts makes a voluntary assignment of property;
>
> (ii) property of the debtor, if absent, is attached; or
>
> (iii) an act of bankruptcy is committed; or
>
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.

The Superior Court of Pennsylvania unanimously affirmed. That court too concluded that the priority provisions of the Tax Lien Act and of Section 3713(a) "produce[d] conflicting results" in this case. Pet. App. 19a. That court too resorted to the "familiar and time honored principle" that "conflicting provisions must be construed together with the more specific provisions prevailing over the general ones." Pet. App. 20a. And, that court too concluded that the Tax Lien Act "is the more specific provision because it applies *only* to federal tax liens," whereas the priority statute "applies to *any* unpaid claim of the government against an insolvent debtor." *Id.* (emphases in original).

The Supreme Court of Pennsylvania also unanimously affirmed. That court concluded that there was a "plain inconsistency" between the respective statutes "because, with respect to tax liens, Section 6323 provides for a 'first in time' priority while Section 3713 gives absolute priority to the United States." Pet. App. 6a-7a. Accordingly, the court held that the Tax Lien Act priorities must prevail, either as an "'implied exception'" to Section 3713, Pet. App. 5a (citing *United States v. Emory*, 314 U.S. 423 (1941) and *United States v. Key*, 397 U.S. 322 (1970)), or under the principle that the "more specific" provisions of the Tax Lien Act qualify the "general" provision of Section 3713, Pet. App. 6a n.9. Quoting from then-Chief Judge Haynsworth's concurring opinion in *H.B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank*, 388 F.2d 156, 161 (4th Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968), the court explained that the Tax Lien Act priorities "would be essentially meaningless" if Section 3713 "always prevailed" when the debtor was insolvent:

> "The question of priorities . . . is wholly or largely academic, unless the debtor is insolvent, and the clearly stated purpose of the Federal Tax Lien Act of 1966 was to regulate the priority of federal tax claims when competing for payment out of the assets of an insolvent taxpayer with secured claims which would enjoy priority under state law."

Pet. App. 11a n.16. After reviewing the text and legislative history of the Tax Lien Act, and this Court's discussion of those

materials in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court further concluded that the Tax Lien Act evidenced an affirmative congressional intent "that federal priorities be limited in the tax area, regardless of whether the debtor is insolvent." Pet. App. 13a.[5]

SUMMARY OF ARGUMENT

I. A. 1. The federal priority statute does not override traditional security interests. The priority statute originated in the crown's prerogative to priority of payment of debts. At common law, however, the royal prerogative did not apply to pre-existing security interests. When the federal priority statute was enacted, a century of English precedent had established that judgment liens would survive assertions of the royal prerogative. In this country, the states incorporated the same limitations into their respective common-law sovereign prerogatives.

2. In light of this tradition, the government bears a heavy burden to establish that the federal priority statute abrogates settled common-law protection for judgment liens and other security interests. This Court has held that statutes must speak directly to the question at issue in order to abrogate a settled common-law principle. The federal priority statute does not speak directly to the elimination of antecedent security interests. Instead, it creates only a priority of payment, itself unsupported by any lien or security interest.

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[5] The decisions below are consistent with a large body of lower court decisions holding that the specific priorities of the Tax Lien Act (or its antecedents) qualify the general provisions of the federal priority statute. *See, e.g., City of Vermillion v. Stan Houston Equip. Co.*, 341 F. Supp. 707, 713 (D. S.D. 1972); *Muniz v. United States*, 155 N.E.2d 140, 143-48 (Ind. Ct. App. 1958) (in banc); *Evans v. Stewart*, 66 N.W.2d 442, 448-49 (Iowa 1954); *James Talcott Inc. v. Roto American Corp.*, 302 A.2d 147, 150-51 (N.J. Super. Ct. 1973); *National Surety Corp. v. Sharpe*, 72 S.E.2d 109, 119-21 (N.C. 1952); *In re Decker's Estate*, 49 A.2d 714, 719-20 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947); *In re Meyer's Estate*, 48 A.2d at 212-15.

3. The Bankruptcy Code confirms the traditional understanding that priority provisions do not affect the rights of secured creditors. Bankruptcy law draws a fundamental distinction between priority provisions, which apply only to unsecured creditors, and security provisions. Bankruptcy law affords a high degree of protection to secured interests, which may be set aside only under narrow provisions specifically addressed to secured interests as such. This Court has recognized that bankruptcy law provides an apt analogy for construing the federal priority statute.

4. On at least four occasions, this Court has held that the federal priority statute does not override antecedent security interests. *United States v. Hooe*, 7 U.S. (3 Cranch) 73, 90 (1805) (mortgage); *Conard v. Atlantic Insurance Company*, 26 U.S. (1 Pet.) 386, 447 (1828) (bonds held as security); *United States v. Hack*, 33 U.S. (8 Pet.) 271, 275 (1834) (equitable lien on partnership assets); *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 615 (1836) (common-law lien on intangible personal property). *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396 (1817), is not to the contrary. In *Conard*, the Court limited *Thelusson* to its highly unusual facts. *See* 26 U.S. (1 Pet.) at 441-44. Following *Conard* and *Brent*, the Attorney General of the United States issued a formal opinion letter concluding that *Thelusson* "has been distinctly overruled." *Case of Richardson*, 9 Op. Att'y Gen. 28, 29 (1857).

B. 1. In a series of cases involving state tax liens on personal property, this Court has fashioned minimum federal standards for determining whether state-created liens qualify as security interests for purposes of surviving application of the federal priority statute. Although a state's characterization of the relevant interest as secured is not "conclusive," it is still "entitled to weight." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 371 (1946).

2. The judgment lien in this case satisfies all applicable federal requirements. The lien clearly identifies the lienor, the amount of the lien, and the property subject to the lien. Moreover, it is immediately enforceable by execution.

3. The government mistakenly contends that a judgment lien on real property cannot survive application of the priority statute unless, in addition to satisfying these requirements, it is also reduced to possession. This Court's decisions requiring possession all have involved state tax liens on personal property. *See United States v. Gilbert Assocs.*, 345 U.S. 361, 362 (1953); *Campbell*, 329 U.S. at 365; *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 354 (1945). The Court's decisions in these cases simply incorporate the longstanding common-law requirement that a creditor must possess the security in order to perfect a lien on *personal* property. Judgment liens on *real* property, by contrast, have never required possession as an element of perfection. The government's proposed possession requirement would place at risk all modern security interests, including mortgages. It also would produce, without good reason, significantly different treatment of secured creditors as between the Bankruptcy Code and the priority statute. By permitting the routine destruction of the property rights of secured creditors, it also would raise substantial enough takings concerns to warrant rejection so as to avoid constitutional difficulty. Finally, the government's broad interpretation of the priority statute would bring that statute needlessly into conflict with the Tax Lien Act.

II. Even assuming that the federal priority statute overrides antecedent security interests generally, the specific Tax Lien Act bars such application of the priority statute in the specific context of federal tax claims.

1. The courts below correctly concluded that the government's construction of the priority statute brings that provision into conflict with the Tax Lien Act. In this case, the government would prevail under the priority statute (as construed by the government), but Romani Industries would prevail under Tax Lien Act. The question presented is how to reconcile these overlapping and conflicting statutes.

2. In cases where overlapping statutes conflict, this Court applies the well-settled rule that specific provisions qualify general

ones. That rule applies regardless of the priority of enactment, but has particular force where the later statute is the more specific one. "We should be reluctant," the Court has explained, "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989). On five occasions, the Court has applied this principle to hold that the priority statute conflicted with, and was therefore qualified by, a subsequently enacted and more specific statute. *Cook County National Bank v. United States*, 107 U.S. 445 (1882) (National Bank Act); *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912) (Bankruptcy Act); *Davis v. Pringle*, 268 U.S. 315 (1925) (same); *Mellon v. Michigan Trust Co.*, 271 U.S. 236 (1926) (Federal Control Act); *United States v. Guaranty Trust Co.*, 280 U.S. 478 (1930) (Transportation Act of 1920).

3. The courts below correctly concluded that the Tax Lien Act is more specific than, and therefore must qualify, the priority statute. The Tax Lien Act applies only to federal tax claims, and it provides a detailed set of priorities in that specific context. Its carefully crafted scheme would be severely undercut if the priority statute overrides all of these interests in every case involving an insolvent debtor. The government urges the Court to limit the Tax Lien Act priorities to cases where the debtor is not insolvent. That limitation would make the Act virtually meaningless, for the priorities are important only when the debtor *is* insolvent.

4. The legislative history of the Tax Lien Act confirms that the Congress intended for the Act to apply to all tax claims. This Court has recognized that the Act demonstrates Congress' disapproval of unrestricted federal priority for tax claims. The government attributes great significance to Congress' failure to enact two proposals made by the American Bar Association, which would have codified the rules urged here by Romani Industries. But the Court is reluctant to draw inferences from Congress' failure to act. Moreover, because the proposals swept

much more broadly than the disputed issues here, it is impossible to attribute any significance to that failure in this case.

5. Finally, this Court's analysis in *Gilbert Associates* suggests that the Tax Lien Act qualifies the federal priority statute. In *Gilbert Associates*, which involved an insolvent debtor, the Court addressed at length a question under the Tax Lien Act, which could not have arisen if the priority statute were controlling in that situation.

ARGUMENT

I. THE FEDERAL PRIORITY STATUTE DOES NOT OVERRIDE ANTECEDENT JUDGMENT LIENS ON REAL PROPERTY

The Pennsylvania Supreme Court decided this case on the assumption that, but for the Tax Lien Act of 1966, the federal priority statute would override the judgment lien obtained in this case by Romani Industries. That assumption is incorrect. In fact, the priority statute does not override judgment liens on real property, or other traditional security interests, already in existence when the debtor's estate is created.[6] Properly construed, therefore, the priority statute cannot conflict with the security interests specifically protected by the Tax Lien Act, including Romani Industries' judgment lien.

A. The Federal Priority Statute Does Not Override Traditional Security Interests

The text of the federal priority statute, read in light of its historical background, in light of comparable priority provisions in the bankruptcy code, and in light of this Court's decisions,

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[6] Except in cases involving an attachment or "act of bankruptcy," the federal priority cannot arise before the debtor's property has passed to a third party, by death or voluntary assignment, for distribution to creditors. *See, e.g., United States v. Oklahoma*, 261 U.S. 253, 259-60 (1923); *Beaston v. Farmers' Bank of Delaware*, 37 U.S. (12 Pet.) 102, 133 (1838).

cannot be construed to override or abrogate traditional security interests.

1. The federal priority statute originated in the common-law "prerogative of the crown," a longstanding sovereign right to "priority of payment of debts." *United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 29, 35 (1832). But just as the royal prerogative was settled, so too were its limitations. In *Marshall v. New York*, 254 U.S. 380, 382 (1920), this Court recognized that the prerogative did not apply to pre-existing security interests, and thus "could be defeated" by liens. In particular, when the federal priority statute was first enacted, a century of common-law precedent had established that judgment liens would survive subsequent assertions of the royal prerogative. *See, e.g., Rorke v. Dayrell*, 4 T.R. 403, 412, 100 Eng. Rep. 1087, 1092 (K.B. 1791) (royal prerogative defeated "where the subject's judgment is prior to the inception of the King's execution"); *The King v. Dickenson*, Parker 262, 263, 145 Eng. Rep. 774, 775 (1692) ("a precedent judgment should be preferred" to the royal prerogative); *Attorney General v. Andrew*, Hadres 22, 26-27, 145 Eng. Rep. 360, 362 (1655) (adopting contention that "[a] judgment is a common security, and ought therefore to be favoured" over the royal prerogative).[7]

These principles endured in the common law of the individual states. As early as 1795, a South Carolina court held that, just as judgment liens and other security interests had been protected

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[7] The common law also protected a wide range of other security interests against subsequent assertions of the royal prerogative, including liens on personal property, *see, e.g., Rex v. Humphrey*, 1823-24 All E.R. 452, 458 (Ex. 1825) (wharfinger's lien); *The King v. Lee*, 6 Price 369, 378, 146 Eng. Rep. 837, 840 (Ex. 1819) ("the Crown could not compel the factors to give up their lien"); mortgages, *see, e.g., Casberd v. Attorney-General*, 6 Price 411, 464, 146 Eng. Rep. 850, 868 (Ex. Ch. 1819) ("if we find that the plaintiffs are equitable mortgagees, of course they are entitled to be paid before the Crown"); and "equitable security," *see Fector v. Philpott*, 12 Price 197, 212, 147 Eng. Rep. 697, 701-02 (Ex. Ch. 1823).

from assertions of the royal prerogative in England, so too were they protected from assertions of the sovereign prerogative of South Carolina. *Commissioners of Public Accounts v. Greenwood*, 1 S.C. Eq. (1 Des.) 450 (1795). As the Illinois Supreme Court later explained, in adopting *Greenwood* as the law of Illinois:

> [T]he state had no prerogative to be paid out of the effects of its debtor in preference to any citizen who had a judgment, mortgage, or other lien. This was not a denial of the succession of the state to the prerogative of priority, for the common law itself made the same exception in the case of the crown that was made in the South Carolina decision.

People v. Farmers' State Bank, 167 N.E. 804, 806 (Ill. 1929). Similarly, the Oregon Supreme Court held that the sovereign prerogative of Oregon, derived from the royal prerogative in England, was a right to priority of payment only against "any one else *not* having an antecedent lien." *United States Fidelity & Guaranty Co. v. Bramwell*, 217 P. 332, 335 (Or. 1923) (emphasis added). *Accord, e.g., Pauley v. California*, 75 F.2d 120, 133 (9th Cir. 1934) (California law) (prerogative applies against "all persons not having antecedent liens"); *Montgomery v. State*, 153 So. 394, 396 (Ala. 1934) (prerogative applies against "all persons not having prior liens"); *State v. Bank of Maryland*, 6 G. & J. 205, 226 (Md. 1834) (prerogative applies where "no lien standing in the way"). *See generally* 3 R. Clark, *A Treatise on the Law and Practice of Receivers* § 669, at 1223-29 (3d ed. 1959).

2. In light of this settled tradition, the government bears a heavy burden to establish that the federal priority statute abrogates centuries of common-law protection — enforceable even against the sovereign — for judgment liens and other security interests. In determining whether statutes abrogate settled common-law principles, this Court has long followed the "well-established principle" that "'[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983),

quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813). Thus, the Court repeatedly has held that, "[i]n order to abrogate a common law principle, [a] statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993), quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). *See also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (citations omitted)).

Read with these principles in mind, the federal priority statute clearly does not abrogate the settled common-law protection for judgment liens and other security. In its present form, the priority statute simply provides that "[a] claim of the United States Government" against the estate of an insolvent debtor "shall be paid first." 31 U.S.C. § 3713(a). In its original forms, the statute similarly provided that, for claims against the estate of an insolvent debtor, "the debt due to the United States shall be first satisfied." Act of March 3, 1797, § 5, 1 Stat. 512, 515; *see also* Act of July 31, 1789, § 21, 1 Stat. 29, 42. On its face, the statute establishes only a right to priority of payment: it creates no security interest in favor of the United States, *see United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805), and it does not address at all — much less "'speak directly'" (*Texas*, 507 U.S. at 534 (quoting *Mobil Oil Corp.*, 436 U.S. at 625)) — to the property rights of other secured creditors.[8]

3. The Bankruptcy Code confirms the traditional understanding that priority provisions do not affect the rights of secured

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[8] Unless specifically addressed to secured claims, priority statutes traditionally have been understood to affect only the rights of unsecured creditors. *See, e.g.*, G. Glenn, *The Law Governing Liquidation* § 510, at 726 (1935); Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905, 907-08 (1954).

creditors. The priority provisions in the Code apply only to unsecured claims (11 U.S.C. § 507), with the "determination of secured status" governed by entirely separate rules (*id.* § 506). As a leading treatise explains:

> The priorities granted by section 507 are priorities as against holders of unsecured claims only. The rights of holders of priority claims are subject to the rights of holders of liens against property. *The right to priority does not grant or imply any right to affect the rights of holders of secured claims* and the rights of holders of secured claims may only be affected to the extent authorized by a particular section of the Code.

4 *Collier on Bankruptcy* ¶ 507.02[4][a] (L. King, ed., 15th rev. ed. 1997) (emphasis added).[9] Thus, the Code allows liens to be avoided only in very limited circumstances, and only under provisions specifically addressed to liens as such. *See, e.g.*, 11 U.S.C. § 545 (avoidance of liens by trustee); *id.* § 522(f) (avoidance of liens by debtor).

Bankruptcy has long reflected these fundamental principles. For example, Section 64 of the Bankruptcy Act of 1898 set forth priority provisions for unsecured interests, and Section 67(d) of that Act confirmed that liens would "not be affected" by the priority provisions. *See* Act of July 1, 1898, §§ 64, 67(d), 30 Stat. 544, 563-64. Similarly, the Bankruptcy Act of 1841 set forth a priority provision, and confirmed that it would not "be

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[9] Other commentators echoed that point:

> A "creditor entitled to priority" is a general and unsecured creditor; and were it not for the express provision of the Act, such a creditor would be treated like all other unsecured creditors in the proportionate distribution of funds. . . . "Creditors entitled to priority" are paid their claims out of the free *unencumbered* funds of the estate but ahead of general creditors.

S. Nadler & M. Nadler, *The Law of Bankruptcy* § 182 (2d ed. 1965) (emphasis added).

construed to annul, destroy, or impair . . . any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the States respectively." Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442.[10]

Bankruptcy law thus draws fundamental distinctions between secured and unsecured creditors; affords substantial protection to the property rights of secured creditors; and, most significant here, does not disturb those rights by operation of general priority provisions. Those principles should control this case, for the Court repeatedly has recognized that, because the bankruptcy statutes "focus more precisely on the problems of insolvency," they provide an "apt" source of guidance in construing the federal priority statute. *See United States v. Moore*, 423 U.S. 77, 84 (1975).[11]

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[10] Consistent with these provisions, this Court consistently has recognized the special protection afforded to secured claims in bankruptcy. *See, e.g., Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Gibson v. Warden*, 81 U.S. (14 Wall.) 244, 248 (1871) (rights of trustee "are subordinate to all the prior liens, legal and equitable, upon the property in question"); *Yeatman v. Savings Institution*, 95 U.S. 764, 766 (1877) (trustee takes property "subject to all equities, liens, or encumbrances"); *Norton's Assignee v. Boyd*, 44 U.S. (3 How.) 426, 436 (1845) ("It is quite clear that the liens and mortgages which are valid under state law must be protected . . . in bankruptcy"); *Ex parte Christy*, 44 U.S. (3 How.) 292, 316 (1845) ("no doubt that the liens, mortgages, and other securities . . . are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy"). *See also In re Cook*, 6 F. Cas. 383, 384 (C.C.D. Mass. 1842) (Story, J.) ("the lien of a judgment . . . is wholly unaffected by the proceedings in bankruptcy").

[11] In commercial law as well, it is axiomatic that secured creditors receive payment before unsecured creditors. Under Article 9 of the Uniform Commercial Code, as the leading commentators have noted, a secured creditor has "a prior right over any such unsecured creditor without a lien." J. White & R. Summers, *Uniform Commercial Code* § 24-2, at 1126-27 (3d ed. 1988).

4. a. On at least four separate occasions, this Court unanimously has held, consistent with these principles, that the federal priority statute does not override antecedent security interests. In *United States v. Hooe*, 7 U.S. (3 Cranch) 73, 90 (1805), the Court held that the priority statute does not override a deed of trust held by a creditor "for the security." Speaking through Chief Justice Marshall, the Court reasoned that only a lien could defeat a competing secured interest, and that the priority statute created no such security. *See id.* In *Conard v. Atlantic Insurance Company*, 26 U.S. (1 Pet.) 386, 447 (1828), the Court held that the priority statute did not apply to certain bonds held as "collateral security" for a debt. The Court rejected the government's contention that the unsecured federal priority ("not of itself a lien") could be "still superior to any lien" (*id.* at 440-41), concluding instead that the priority statute creates only "a mere right of prior payment, out of the *general* funds of the debtor." *Id.* at 439 (emphasis added).[12] In *United States v. Hack*, 33 U.S. (8 Pet.) 271, 275 (1834), the Court held that the priority statute did not defeat an equitable lien held on partnership assets held by a partner of the insolvent government debtor.[13] Finally, in *Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 615 (1836), the Court held that the priority statute does not override a common-law lien on intangible personal property. In so doing, the Court stressed that the priority statute is defeated not only by a prior sale of the property at issue, but also by a prior

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[12] The Court subsequently affirmed its reasoning in two related cases. *Conard v. Nicoll*, 29 U.S. (4 Pet.) 291, 305, 310 (1830); *Conard v. Pacific Insurance Co.*, 31 U.S. (6 Pet.) 262, 279-80 (1832). For a summary of the complex history of the *Conard* litigation, see Kennedy, *Relative Priority*, 63 Yale L.J. at 909-10.

[13] At common law, partners held an equitable lien to have partnership assets applied to the debts of the partnership. *See, e.g., Fitzpatrick v. Flannagan*, 106 U.S. 648, 654-55 (1882); *Case v. Beauregard*, 99 U.S. 119, 125 (1878). In *Hack*, the Court held that the priority statute entitled the government to obtain partnership assets only *after*, consistent with the equitable lien, all other partnership debts had been satisfied. *See* 33 U.S. (8 Pet.) at 275-76.

transaction that "approximates to one which merely gives a lien." *Id.* at 612.

Riding circuit in *United States v. Lewis*, 26 F. Cas. 920, 924 (C.C. E.D. Pa. 1875), Justice Strong explained that, under these decisions, the priority statute "does not override any liens upon the debtor's property." Justice Strong noted that the "reason" for this rule was "obvious":

> The claim of the government extends only to that which was the property of the debtor when he became insolvent, and his property is only that, in substance, which remains *after* the satisfaction of liens upon it. His power of disposition extends no farther. The lien is paramount to his right.

Id. (emphasis added). This Court unanimously affirmed that decision. *Lewis v. United States*, 92 U.S. 618 (1875). Similarly, in *Field v. United States*, 34 U.S. (9 Pet.) 182 (1835), a district court held that, under *Conard*, the priority statute does not override competing secured claims:

> "It is to the unencumbered estate of the insolvent, divested of any pre-existing lien, that they must look for priority of payment, for, having no lien themselves on their debtor's property while it is under his own control, they cannot reach it in the hands of others, who have an implied right to it in case of the non payment of the debt for which it is security."

See id. at 197 (quoting opinion below). In reversing the district court's judgment in favor of the United States, on grounds not relevant here, this Court expressed no disagreement with that analysis.

b. Against all of this authority, the government relies on *Thelusson v. Smith*, 15 U.S. (2 Wheat.) 396 (1817), which it characterizes as having "held" that the priority statute applies "even when a competing creditor possesses a valid and enforceable judgment lien." Pet. Br. 14. *Thelusson* did state, as the government explains, that the priority statute "makes no exception in favour of prior judgment creditors." 15 U.S. (2 Wheat.) at

425. Subsequently, however, the Court limited *Thelusson* to its facts and specifically disavowed the broad holding attributed to it by the government.

In *Conard*, the Court explained at length that *Thelusson* "turned upon its own particular circumstances," and had been "greatly misunderstood." *See* 26 U.S. (1 Pet.) at 441-44.[14] In *Thelusson*, judgment creditors sued a marshal for the proceeds of an adverse execution by the government. In that context, the Court explained, the judgment creditors could prevail only if they had previously acquired *title* to the property at issue, not because the priority statute would defeat any lesser property interest, but because their lien remained attached to the *property* itself (which was still secured), as opposed to the *proceeds* from its sale (which were unsecured). *See Conard*, 26 U.S. (1 Pet.) at 445 [sic 443]-44.[15] The Court in *Conard* emphatically disavowed any suggestion in *Thelusson* that the priority statute "cut[s] out the lien" of a first-in-time security interest that is "perfect, independent of possession," but not yet reduced to possession. *See id.* at 442.

Following *Conard* and *Brent*, the Attorney General of the United States issued a formal opinion letter concluding that *Thelusson* "has been distinctly overruled, and by the later cases it seems to be well settled that the priority of the United States will not reach back over any lien, whether it be general or

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[14] Justice Story's opinion for the Court in *Conard* was joined by five of the seven Justices who had participated in *Thelusson*, including Justice Washington, who authored both the circuit court decision in *Thelusson* and, in the same opinion, the decision of this Court affirming himself (*see* 15 U.S. (2 Wheat.) at 426).

[15] Thus, the plaintiff judgment creditors in *Thelusson* could have prevailed if they had made a subsequent levy against the property — which would have defeated even the *security* interest arising out of the government's last-in-time judgment lien. *See* 26 U.S. (1 Pet.) at 445 [sic 433] (property "may be levied upon" by junior creditor "who is entitled to hold it against every other person *except such judgment creditor*" (emphasis added)).

specific." *Case of Richardson*, 9 Op. Att'y Gen. 28, 29 (1857). *Accord, e.g., Cottrell v. Pierson*, 12 F. 805, 807 (C.C.D. Neb. 1881) (*Conard* "overruled" *Thelusson*); *Postmaster General v. Robbins*, 19 F. Cas. 1126, 1127 (D. Me. 1829) (*Conard* limited *Thelusson* to "its own particular circumstances"); *Muniz v. United States*, 155 N.E.2d 140, 145 (Ind. Ct. App. 1958) (in banc) (*Conard* "overruled" *Thelusson*).

Like the relevant history and bankruptcy provisions, this Court's decisions confirm that the priority statute does not override traditional security interests.

B. A Judgment Lien On Real Property Qualifies As A Traditional Security Interest

1. In a series of cases involving state tax liens on personal property, this Court has fashioned minimum federal standards for determining whether state-created liens qualify as security interests for purposes of surviving application of the federal priority statute. The Court has recognized that it is ultimately "a matter of federal law" whether state-created security interests displace a priority afforded under a federal statute. *United States v. Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 356-57 (1945). At the same time, however, the Court has attempted to accommodate state law where possible, and to avoid imposing an entirely federalized body of security law. Thus, a state's characterization of the relevant interest as secured, although not "conclusive," is still "entitled to weight." *Illinois ex rel. Gordon v. Campbell*, 329 U.S. 362, 371 (1946). The Court's approach to the priority statute is thus consistent with its approach to other federal statues, where it likewise has permitted state law — within a range of "permissible variations" — to govern questions not directly addressed by the statute. *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (definition of "children" under Copyright Act); *see, e.g., Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (definition of "property" under Bankruptcy Code); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99 (1991) (nature of demand requirement for derivative action under Investment Companies Act); *United States v. Kimbell Foods*, 440

U.S. 715, 736 n.37 (1979) (consensual lien priorities under Small Business Act). Not surprisingly, the "permissible variations" in state law include those laws consistent with "ordinary usage." *See De Sylva*, 351 U.S. at 581.

2. The judgment lien in this case satisfies all of the federal requirements imposed by this Court for a state-created lien to survive application of the priority statute. In *Campbell*, this Court held that such a lien must be "definite" with respect to "(1) the identity of the lienor, (2) the amount of the lien, and (3) the property to which it attaches." 329 U.S. at 375 (citations omitted). Moreover, in *New York v. Maclay*, 288 U.S. 290, 294 (1933), the Court held that such a lien also must be "presently enforcible." The judgment lien in this case clearly identifies both the lienor (Romani Industries) and the amount of its lien ($400,000). Pet. App. 2a. Moreover, it applies only to Mr. Romani's real property located in Cambria County, Pennsylvania. *Id.*; 42 Pa. Cons. Stat. Ann. § 4303(a). Its identification of the encumbered property is thus far more precise than the descriptions held impermissibly vague in *Campbell*, which involved a state tax lien on all personal property "used by [the debtor] in connection with his trade, occupation, profession or business," *see* 329 U.S. at 372, 375-76, and in *United States v. Texas*, 314 U.S. 480, 484 (1941), which involved a state tax lien on all property "devoted to or used in [the debtor's] business as a distributor." Finally, unlike the state tax lien at issue in *Maclay*, the judgment lien here was immediately enforceable by execution. *See* Pa. R. Civ. P. 3103.

3. The government contends that no lien may survive application of the priority statute unless, in addition to satisfying the minimum federal requirements addressed above, it is also reduced to possession. Pet. Br. 15 & n.5. That position is unwarranted as a matter of precedent, history, and common sense.

a. In its more recent decisions addressing the priority statute, this Court often has mentioned a requirement that liens be reduced to possession. Every case that actually turned on that requirement, however, involved a state tax lien on *personal* property.

See United States v. Gilbert Assocs., 345 U.S. 361, 362 (1953); *Campbell*, 329 U.S. at 365; *Waddill*, 323 U.S. at 354.[16] In deeming such liens to be perfected without possession, the states in these cases had abrogated venerable common-law principles. With respect to liens on personal property, the requirement that a creditor "take possession of his collateral" in order to perfect the security interest "dates from the beginning of legal history." 1 G. Gilmore, *Security Interests in Personal Property* § 14.1, at 438 (1965). Liens on personal property remaining in the debtor's possession were completely "unknown" at common law, and indeed were considered "fraudulent." *See id.* § 2.1, at 24; *Twyne's Case*, 3 Co. Rep. 806, 812-13 & n.(c) (Star Chamber 1601).[17] Against this backdrop, the Court's possession requirement, applied to state tax liens on personal property, reflects simply an affirmation of traditional common-law rules, federalized so as "to

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[16] *Waddill* also involved a landlord's lien on personal property. *See* 323 U.S. at 356. Of the other cases cited by the government (Pet. Br. 15 & n.5), *United States v. Vermont*, 377 U.S. 351 (1964), involved construction of the Tax Lien Act; *United States v. Texas* involved a state tax lien on personal property for an uncertain amount (*see* 314 U.S. at 487); *Maclay* involved a state tax lien that was not "presently enforceable" (*see* 288 U.S. at 294); and *County of Spokane v. United States*, 279 U.S. 80, 94-95 (1929), involved a state tax lien on personal property that was not perfected even as a matter of state law.

[17] Outside the context of regulating their own tax liens, the states retained the common-law rule that possession is necessary in order to create a lien on personal property. *See, e.g., Wright v. Terry*, 2 So. 6, 9 (Fla. 1887) ("exclusive legal possession is an essential element of a common-law lien on personal property"); *Warren v. First National Bank*, 38 N.E. 122, 129 (Ill. 1893) ("to obtain such lien the factor must have the goods lawfully in his possession"); *Muniz*, 155 N.E.2d at 147 (Indiana law) ("Neither a judgment nor a state tax is a lien on *personal property* until a levy has been made.") (emphasis in original); *Deeley v. Dwight*, 30 N.E. 258, 258 (N.Y. 1892) ("possession by the lienor of chattels on which the lien is claimed is indispensable to support a common-law lien"); *Jordan, Ellis & Co. v. L. & J. James*, 5 Ohio 88, 98 (1831) ("It is essential to liens, that persons claiming them have the possession of the chattel upon which they are claimed to operate.").

prevent States from 'undercutting'" a federal statute with arbitrary, novel, and self-serving rules (*Kimbell Foods*, 440 U.S. at 736 n.37).[18]

The relevant considerations are entirely different, however, with respect to judgment liens on real property. Most importantly, those interests are traditional. As the Pennsylvania Supreme Court has noted, judgment liens on real property "are the product of centuries of statutes." *In re Upset Sale*, 479 A.2d 940, 943 (Pa. 1984). In England, judgment liens on real property have existed at least since the Statute of Westminster II of 1285, 13 Ed. 1, c. 18 (1285), 1 Stat. Realm 82 (1810). *See* Riesenfeld, *Enforcement of Money Judgments in Early American History*, 71 Mich. L. Rev. 691, 694 (1973). And as Chief Justice Marshall explained long ago, judgment liens on real property — like mortgages, and unlike liens on personal property — traditionally were perfected without acquiring possession. *See Rankin & Schatzell v. Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827).[19] These principles also enjoy widespread continuing support among the states. *See, e.g.*, 5 R. Powell & P. Rohan, *Powell on Real Property* § 38.02[2], at 38-6 (1997) ("Generally the docketing of

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[18] The possibility of such manipulation of state security definitions appears especially likely in *Gilbert Associates*, where a state court had characterized machinery as "real estate," and an assessment as a "judgment," for purposes of its own tax enforcement scheme. *See Petition of Gilbert Assocs.*, 90 A.2d 499, 501-02 (N.H. 1952), *rev'd*, 345 U.S. 361 (1953). Not surprisingly, this Court held that those characterizations did not bind it for federal law purposes.

[19] Applying security and first-in-time principles "believed to be universal," the Court in *Rankin & Schatzell* held that a judgment lien creditor could execute on property already executed upon by a junior judgment lien creditor. *See* 25 U.S. (12 Wheat.) at 177-78. In analogizing judgment liens to mortgages, the Court explained that a judgment lien "is as binding as a mortgage, and has the same capacity to hold the land so long as the statute preserves it in force." *Id.* at 179. And in distinguishing judgment liens from "executions against personal property," the Court explained that in personal property cases, "the lien is not created by the judgment." *See id.*

the judgment gives the judgment creditor a lien on all of the judgment debtor's real property in the county of docketing or recording."). Moreover, Congress itself has recognized state-created judgment liens as an appropriately protected category of security interest. *See, e.g.*, 26 U.S.C. § 6323(a) (protection under Tax Lien Act); 42 U.S.C. § 9607(*l*)(3) (protection under CERCLA). Finally, because judgment liens are broadly applicable interests that primarily benefit private parties, there is little reason to fear that the States will manipulate their doctrines in this area — unlike in the area of state tax liens — either to further their own interests or to retard federal interests inappropriately. For all of these reasons, there is no basis for this Court to create a federal common-law rule that judgment liens, for purposes of the priority statute, are not perfected unless and until they are reduced to possession.

b. The breadth of the government's "title or possession" theory (Pet. Br. 15 & n.5) also would present significant practical problems. Most significantly, it would gravely destabilize all modern security interests — including mortgages. The government's suggestion that mortgages could survive application of the priority statute under its proposed theory (Pet. Br. 15 n.5) is at best doubtful. With regard to title: Although the common law regarded a mortgagor as holding title to the property at issue, approximately 30 states now regard the mortgagor as holding only a lien on the property, with the mortgagee retaining actual title. *See, e.g.*, 4 R. Powell, *Powell on Real Property* ¶ 439, at 37-10 to 37-13 (1997); G. Nelson & D. Whitman, *Real Estate Finance Law* 150-59 (3d ed. 1993). Thus, all mortgages in the so-called "lien theory" states would be at risk. Nor would the possession element of the government's theory reduce that risk. Under the "lien theory" of mortgages, the mortgagee by definition retains the right of possession (until default). And even in the "title

theory" states, the mortgagee generally retains that right, either by statute or by agreement of the parties. *See, e.g., id.* at 153.[20]

The government's theory also would produce sharply different treatment of secured creditors as between the Bankruptcy Code and the priority statute.[21] As explained above, the Code contains no provision that would allow unsecured creditors to frustrate the claims of secured creditors. Under the government's theory, however, the priority statute would defeat secured claims whenever the secured party had failed to perfect *and execute* (thus reducing to possession) its security interest before the federal priority had attached. There is no conceivable justification for a judge-made rule to produce that result, which would create perverse incentives for secured creditors to drive possibly insolvent debtors, willingly or unwillingly, into bankruptcy.[22]

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[20] So far, the lower courts have managed to resist the government's attempts to expand the scope of the priority statute to override even mortgages. *See, e.g., Southern Ry. Co. v. United States*, 306 F.2d 119, 126 (5th Cir. 1962) (priority statute "gives way to a valid recorded first mortgage"). The lower courts even have held that a wide variety of *unsecured* claims survive application of the priority statute, including claims for an estate's administrative expenses, *e.g., Abrams v. United States*, 274 F.2d 8, 12 (8th Cir. 1960); for funeral expenses of the deceased debtor, *e.g., Martin v. Dennett*, 626 P.2d 473, 475 (Utah 1981); and for spousal and family allowances, *e.g., Schwartz v. Commissioner of Internal Revenue*, 560 F.2d 311, 314-15 n.7 (8th Cir. 1977).

[21] In 1978, Congress expressly excluded the priority statute from application in bankruptcy proceedings. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. III, § 322(a), 92 Stat. 2678, codified at 31 U.S.C. § 3713(a)(2).

[22] As one prominent commentator in this area has noted, discrepancies between the bankruptcy rules and the insolvency rules would give secured creditors "a distinct incentive to throw into bankruptcy a debtor whose case might have been handled, with less expense and less burden on the federal courts, in another form of proceeding." Plumb, *Federal Liens and Priority*, 77 Yale L.J. 228, 242 (1967). That problem is exacerbated because, "unless the accident of death makes the choice for them," creditors generally may "substitute a federal bankruptcy proceeding for any collective action" to which the priority statute is applicable. W. Plumb, *Federal Tax Liens* 199-200 (3d ed. 1981).

Moreover, cases involving decedents' estates — which are ineligible for bankruptcy precisely because of congressional solicitude for traditional state-law probate, *see In re Goerg*, 844 F.2d 1562, 1566 (11th Cir. 1988) — would be governed by a *more* intrusive federal rule of decision about the respective rights of the United States against secured creditors.

c. By permitting the routine destruction of the property rights of secured creditors, the government's broad "title or possession" theory also would create substantial constitutional difficulties. In *Armstrong v. United States*, 364 U.S. 40, 44 (1960), this Court held that federal action destroying all value of certain liens constituted a Fifth Amendment taking.[23] The Court in *Armstrong* explained that there was no basis for distinguishing, at least for takings purposes, the liens at issue there from the mortgage also held compensable in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). Since *Armstrong*, the Court has broadly expanded the category of non-fee interests entitled to Takings Clause protection, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); has held that mortgage interests are protected property for Due Process purposes, *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); and has held that the destruction of all economic value, at least with respect to fee interests, constitutes a *per se* taking, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

On another occasion, this Court construed the Bankruptcy Code so as to avoid the takings concerns that would be presented by the destruction of a lien. *United States v. Security Industrial Bank*,

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[23] The value of the liens in *Armstrong* was destroyed because the government had exercised its contract right to acquire certain encumbered property from a contractor. As a result, the liens became unenforceable by virtue of sovereign immunity. *See* 364 U.S. at 46.

459 U.S. 70 (1982).[24] The Court stressed the constitutional "difficulty" that arises when federal power is "used to defeat traditional property interests" such as liens. *Id.* at 75. Quoting from *Armstrong*, the Court reiterated that the "'total destruction'" of "'all value of these liens'" would constitute a compensable taking. *Id.* at 77. Similar concerns are present in cases like this one, where application of the priority statute would destroy the entire value of the property interest held by Romani Industries. Accordingly, the Court should invoke the "'cardinal principal'" of interpreting the priority statute so as to avoid the constitutional question. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, such an interpretation is not only possible, but also correct.

d. Finally, the government's broad interpretation of the priority statute would bring that statute into conflict with the Tax Lien Act in circumstances where, as here, the Tax Lien Act specifically protects the private security interest at issue. As we explain below, any such conflict must be resolved in favor of the specific provisions of the Tax Lien Act and against the general provisions of the priority statute. Nonetheless, avoidance of such a conflict in the first instance provides yet another reason to construe the priority statute as establishing for the government only a first priority as among unsecured creditors.

II. THE TAX LIEN ACT PREVENTS APPLICATION OF THE PRIORITY STATUTE IN THE SPECIFIC CONTEXT OF FEDERAL TAX CLAIMS

Even assuming that the federal priority statute overrides antecedent security interests generally, the priority statute cannot be applied to abrogate security interests specifically protected by the Tax Lien Act.

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[24] In order to minimize possible takings concerns, the Court construed 11 U.S.C. § 552(f)(2), which permits individual debtors to avoid certain liens, so as not to apply retroactively to property rights created prior to its enactment. *See* 459 U.S. at 73-78.

1. The courts below correctly concluded that the priority statute, as construed by the government, overlaps and conflicts with the Tax Lien Act. This case demonstrates that conflict. Applying only the priority statute (as construed by the government), the government would be "paid first" even though Romani Industries' competing claim is secured. 31 U.S.C. § 3713(a). On the other hand, applying only the Tax Lien Act, the government's tax lien would "not be valid" against Romani Industries' first-in-time judgment lien, and Romani Industries' secured claim would then prevail against the government's competing unsecured claim. 26 U.S.C. § 6323(a). The result in the case thus "differs" depending on which statute is applied. Pet. App. 6a. Thus, the question presented is not simply whether the government would prevail under the priority statute considered in isolation (Pet. Br. 16-17), but how to reconcile the priority statute with the Tax Lien Act in the considerable range of cases where the former statute (as construed by the government) conflicts with the latter.

2. a. In cases where overlapping statutes conflict, this Court's approach is well-settled: Absent a clearly expressed congressional intent to the contrary, "specific provisions qualify general ones." *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Although this principle applies "regardless of the priority of enactment," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), it has particular force where the later statute is the more specific one. "We should be reluctant," the Court has explained, "to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (specific provisions of Title VII qualify general provisions of 42 U.S.C. § 1981); *see, e.g., Seattle Audubon Society*, 503 U.S. at 439-40 (specific provisions of Northwest Timber Compromise qualify general provisions of Migratory Bird Treaty Act); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 734 (1989) (specific provisions of 42 U.S.C. § 1983 qualify general provisions of 42 U.S.C. § 1981); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (specific provisions of Foreign

Sovereign Immunities Act qualify general provisions of Alien Tort Statute); *United States v. Fausto*, 484 U.S. 439, 453 (1988) (specific provisions of Civil Service Reform Act qualify general provisions of Back Pay Act and Tucker Act). A statute is "specific" for these purposes if it is either narrower, *e.g.*, *Traynor v. Turnage*, 485 U.S. 535, 548 (1988); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), or more detailed, *e.g.*, *Jett*, 491 U.S. at 734; *Amerada Hess*, 480 U.S. at 438, than the competing statute. By construing specific statutes to qualify general ones, the Court accomplishes the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *Fausto*, 484 U.S. at 453.

Closely related to this rule is the presumption against implied repeals. Where a specific statute conflicts with a later and more general statute, the Court has applied the presumption against implied repeals to reinforce the rule that a specific statute (enacted earlier) qualifies a general one (enacted later). *See, e.g.*, *Traynor*, 485 U.S. at 547-48; *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442, 445 (1987); *Radzanower*, 426 U.S. at 153-55; *Morton v. Mancari*, 417 U.S. at 549-51. But where a specific statute conflicts with an *earlier* and more general statute, thus bringing the presumption against implied repeals into conflict with the rule that specific provisions qualify general ones, the Court repeatedly has applied the rule that specific provisions qualify general ones, and repeatedly has refused to apply the presumption against implied repeals. *See, e.g.*, *Amerada Hess*, 488 U.S. at 438; *Fausto*, 484 U.S. at 453.[25]

[25] The Court also applies the presumption against implied repeals to reinforce the principle that statutes should be construed, if possible, so as not to conflict with one another. *See, e.g.*, *Rodriguez v. United States*, 480 U.S. 522, 524 (1987 (per curiam); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). As explained above, that principle supports construing the priority statute to afford the government first priority only among unsecured creditors.

Finally, where overlapping statutes conflict and it is impossible to characterize one or the other as more specific, yet another rule of construction governs: a more recent statute qualifies a less recent one. *See, e.g.*, *Watt v. Alaska*, 451 U.S. 259, 266 (1981); 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02 (4th ed. 1973); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 104 (2d ed. 1874).

b. This Court repeatedly has applied these principles in cases involving the federal priority statute. On at least five separate occasions, the Court unanimously has held that the priority statute conflicted with — and was therefore qualified by — subsequently enacted and more specific statutes. In *Cook County National Bank v. United States*, 107 U.S. 445, 448-51 (1882), the Court held that the National Bank Act, which set forth a comprehensive "system for the establishment and government of national banks" (*id.* at 448), barred application of the priority statute to federal claims against such banks. In *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152, 159-60 (1912), and *Davis v. Pringle*, 268 U.S. 315, 317-18 (1925), the Court held that the priority provisions of the Bankruptcy Act barred application of the priority statute in bankruptcy cases.[26] In *Mellon v. Michigan Trust Co.*, 271 U.S. 236, 238-40 (1926), the Court held that the Federal Control Act barred application of the priority statute to government claims on behalf of railroads subject to federal control. Although the Federal Control Act contained no provision directly inconsistent with the priority statute, the Court concluded that application of the priority statute "would conflict with the spirit and broad purpose" of the later

[26] When these cases were decided, the literal text of the priority statute encompassed bankruptcy cases. Congress made the exclusion explicit only in 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, tit. III, § 322(a), 92 Stat. 2678, codified at 31 U.S.C. § 3713(a)(2).

Act. *Id.* at 240.[27] Finally, in *United States v. Guaranty Trust Co.*, 280 U.S. 478 (1930), the Court held that the Transportation Act of 1920, which comprehensively regulated the indebtedness of certain railroads to the federal government, barred application of the priority statute to claims arising under that Act. Although the Transportation Act created no distinctive priority provisions, the Court, speaking through Justice Brandeis, concluded that application of the priority statute "would have defeated the purpose" of the Act. *Id.* at 485.

Not surprisingly, the government cites no case in which this Court has held that the priority statute qualifies a later and more specific statute with which it is inconsistent. Neither *United States v. Key*, 397 U.S. 322 (1970), nor *United States v. Emory*, 314 U.S. 423 (1941), supports that remarkable proposition. In *Key*, the Court held that the priority statute is entirely consistent with a provision requiring a "fair and equitable" distribution to certain competing creditors. *See* 397 U.S. at 327. In *Emory*, the Court held that the priority statute is entirely consistent — in *non*-bankruptcy cases — with the bankruptcy priority provisions. *See* 314 U.S. at 427-28 & n.4. Those cases involved no inconsistency between the priority statute and any other provision. Accordingly, the cases did not even address, much less modify, the well-settled principles for determining the interaction of overlapping and inconsistent statutory provisions.[28]

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[27] In pertinent part, the Federal Control Act simply prohibited the federal government, in defending suits brought by third parties against controlled railroads, from defending on the ground that the railroads were an "instrumentality or agency" of the government. *See* 271 U.S. at 238.

[28] In the Pennsylvania Supreme Court, the government acknowledged that "'general rules of construction suggest that the broad mandate of [the priority statute] should yield to the specific priorities prescribed by the tax lien legislation.'" Brief for Appellant, *In re Estate of Francis J. Romani*, No. 0059 W.D. Appeal Docket 1995, at 26 (filed Jan. 29, 1996) (citation omitted). Nonetheless, the government argued that *Key* had established a separate canon of "special deference" to the priority

3. a. The courts below correctly concluded that the Tax Lien Act is more specific than, and therefore must qualify, the priority statute. The Tax Lien Act, which applies only to federal tax claims, is obviously narrower than the priority statute, which on its face applies to all federal claims without limitation. Indeed, this Court repeatedly has described the priority statute as "broad and sweeping," *Waddill*, 323 U.S. at 355, and as a "generalized statut[e] giving the United States priority in a wide range of situations," *United States v. Randall*, 401 U.S. 513, 517 (1971). The Tax Lien Act is also far more detailed than the priority statute. Whereas the priority statute provides only that certain federal government claims "shall be paid first," 31 U.S.C. § 3713(a), the Tax Lien Act comprehensively regulates the priority of interests competing against federal tax liens. For example, the Tax Lien Act defines four categories of interests that compete against federal tax liens on a first-in-time basis (26 U.S.C. § 6323(a), App. 2a), ten categories of interests that prevail even against a first-in-time federal tax lien (26 U.S.C. § 6323(b), App. 2a-5a), three categories of interests that prevail against a first-in-time federal tax lien if they also receive certain protections as a matter of state law (26 U.S.C. § 6323(c), App. 5a-8a), and a distinct set of priorities for interests competing against estate and gift tax liens (26 U.S.C. §§ 6324, 6324A, 6324B, App. 17a-24a). This carefully crafted scheme would be gravely undercut if, as the government contends, the priority

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statute. *Id.* In this Court, the government makes the same contention more obliquely, by arguing that the priority statute should qualify the Tax Lien Act (and not vice versa) — even if the later Tax Lien Act conflicts with and is more specific than the earlier priority statute — as long as an unconditional application of the priority statute would not "deprive the [Tax Lien Act] of *any* meaning." Pet. Br. 18 (emphasis added). Nothing in *Key* or *Emory* supports that proposition, which is inconsistent not only with this Court's general rules of construction, but also with specific decisions, including *Cook County National Bank*, *Mellon*, and *Guaranty Trust Co.*, applying those rules of construction to the priority statute.

statute overrides *all* of these interests in *every* case (outside of bankruptcy) involving an insolvent debtor.

b. The government contends that, even if the priority statute overrides the Tax Lien Act "in cases involving insolvents," the Tax Lien Act still has meaningful application in non-insolvency cases. Pet. Br. 22. Insolvency, however, is precisely where the Tax Lien Act priorities are the most significant. As the Pennsylvania Supreme Court explained in this case, those priorities "would be essentially meaningless" if the federal priority statute "always prevailed" when the debtor was insolvent, for "[t]he question of priorities is wholly or largely academic, unless the debtor is insolvent." Pet. App. 11a n. 16 (quoting *H.B. Angsten & Sons*, 388 F.2d at 161 (Haynsworth, C.J., concurring)). And as that court explained long ago, limiting the Tax Lien Act priorities to cases involving solvent debtors "would be quite unreasonable, since there could be no need or reason for such legislation if intended to provide merely for relative priorities in the distribution of assets of solvent debtors." *In re Decker's Estate*, 49 A.2d 714, 720 (Pa. 1946), *cert. denied*, 331 U.S. 807 (1947).[29] Moreover, even if there were some small

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[29] Others also have noted the implausibility of the government's proposed limitation of the Tax Lien Act priorities to cases involving solvent debtors. *See, e.g., In re Meyer's Estate*, 48 A.2d at 213 ("It is only when the funds are not sufficient to pay all claims, that the question of priority becomes of real interest, and it was that situation that moved Congress to give added protection to judgment creditors."); Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 9 (1971) (government's position would nullify "the hard-won and much-needed protections provided for secured creditors and certain lienors by the Federal Tax Lien Act" in "the very circumstance in which those protections would become of crucial importance"); Note, Nesbitt v. United States: *Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 744 (1984) (government's position would impose "a tax lien variation of 'Catch-22': the priority accorded . . . by the tax lien legislation is only effective in the distribution of assets of a solvent debtor -- in which case, the issue of priority is wholly academic as the debtor is capable of satisfying all

class of cases where the Tax Lien Act priorities would matter even though the debtor was solvent, the government's proposed limitation of those priorities would largely "circumvent the detailed remedial scheme constructed in" the Tax Lien Act (*Patterson*, 491 U.S. at 181), and thereby "conflict with the spirit and broad purpose" of that Act (*Mellon*, 271 U.S. at 240). That alone establishes that the Tax Lien Act qualifies, and is not qualified by, the earlier and more general federal priority statute.[30]

The government also notes that the priority statute applies based only on a government "claim" (Pet. Br. 22), whereas the Tax Lien Act affords protection only against a government "lien" (Pet. Br. 20). That distinction suggests a possibly alternative theory that, in insolvency cases, the Tax Lien Act operates to eliminate the government's *secured* interest (as reflected in the tax lien), but the priority statute enables the government to prevail on its *unsecured* interest (as reflected in the underlying tax debt). But that account does not eliminate the fundamental structural flaw in the government's position: that the priority statute operates to render ineffective the subsequently enacted and more specific Tax Lien Act priorities in the vast majority of cases where those priorities could even possibly be significant. Moreover, it suffers an additional substantive flaw as well. As a leading commentator has explained: "It is paradoxical that the federal government should stand in a better position as an unsecured creditor than as a secured creditor — a result which can hardly have been contemplated by those who drafted and sponsored the federal tax lien statute." Kennedy, *From* Spokane

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claims against him").

[30] The government suggests that because the definition of insolvency for purposes of the priority statute is idiosyncratically small, the Tax Lien Act priorities, under its theory, would continue to apply to a significant class of non-insolvency cases. Pet. Br. 22-23. In fact, however, the definition of insolvency for purposes of the priority statute tracks the traditional definition of insolvency for bankruptcy purposes. *See Key*, 397 U.S. at 328 n.7.

County *To* Vermont: *The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L. Rev. 724, 744 (1965).

4. The legislative history of the Tax Lien Act and its predecessors confirms that the Congress intended for the Act to apply to all tax claims, even where the debtor is insolvent.

a. In *Kimbell Foods, Inc.*, this Court recognized that the Tax Lien Act clearly demonstrates "Congress' disapproval of unrestricted federal priority" for tax claims. *See* 440 U.S. at 738. That disapproval began in 1913, when Congress specifically gave first-in-time judgment creditors, among others, priority over the lien securing a federal tax claim. *See* Act of Mar. 4, 1913, ch. 166, 37 Stat. 1016. The Committee Report for the 1913 statute broadly stated that the government should "occupy the same position with reference to liens on property as does the individual." H.R. Rep. No. 62-1018, at 2 (1912). Over the next several decades, Congress repeatedly expanded the protections afforded to private creditors competing against government tax claims. *See, e.g.*, Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905, 922 n.104 (1954). Finally, in 1966, Congress substantially amended the tax lien statute to afford even greater and more comprehensive protection to such private creditors. *See* Pub. L. No. 89-719, 80 Stat. 1125 (1966). The legislative history specifically stated that the 1966 amendments were designed to "conform the lien provisions of the internal revenue laws to the concepts developed in this Uniform Commercial Code," S. Rep. No. 89-1708, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3722, 3722, under which secured creditors prevail against unsecured creditors, *see supra* note 11.

b. The government attributes great significance to Congress' failure to enact two proposals made by the American Bar Association in 1959 and 1970 respectively. Pet. Br. 26-28. This Court, however, is "'reluctant to draw inferences from Congress' failure to act.'" *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). *See also United States v. Wells*, 117 S. Ct.

921, 929 (1997) ("'"at best treacherous"'" to find congressional silence controlling (citations omitted)). Moreover, congressional inaction is particularly insignificant here, where the ABA proposals would have changed existing law far beyond any question presented in this case. Among other things, the 1959 proposal would have provided (i) that the priority statute does not override security interests specifically protected by the Tax Lien Act, (ii) that the priority statute does not override any other antecedent security interests, and (iii) that the government would have only a *sixth* priority, even in insolvency proceedings and even among unsecured creditors. *See* American Bar Association, *Final Report of the Committee on Federal Liens* 121-22 (1959) (hereafter "ABA Final Report"), *reprinted in* Staff of House Comm. on Ways and Means, *Legislative History of H.R. 11256*, at 239-40 (1966) (hereafter "Legislative History"). The 1970 proposal would have gone even farther. In addition to all of the provisions mentioned above, the 1970 amendment also would have (iv) eliminated the federal priority *in its entirety* for all non-tax claims. *See* Plumb, *The Federal Priority in Insolvency: Proposals for Reform*, 70 Mich. L. Rev. 1, 10 n.53 (1971). Even if the entire Congress had rejected the ABA proposals — which it did not — there would still be no basis to infer that Congress disapproved either of the first two provisions mentioned above, which are at issue in this case, or only one or more of the last two provisions, which are not at issue here.[31]

5. Finally, this Court's analysis in *Gilbert Associates*, although not directly controlling, strongly suggests that the Tax Lien Act qualifies the federal priority statute, and not vice versa, in cases

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[31] With respect to the questions at issue in this case, the ABA appears to have viewed its proposals as confirming, rather than modifying, existing law. The 1959 proposal would have "assured," contrary to "suggestions" made in "some" decisions, that the priority statute would not override existing liens. *See* ABA Final Report, at 124, *reprinted in* Legislative History, at 242. The 1970 proposal was designed "partly to clarify" that the priority statute does not override existing liens. *See* Plumb, *Federal Priority in Insolvency*, 70 Mich. L. Rev. at 10 n.53.

involving tax claims against insolvent debtors. As explained above, *Gilbert Associates* held that a state tax lien was unsecured, for purposes of the priority statute, because the state had not satisfied the common-law requirement of obtaining possession of the personal property at issue. *See* 345 U.S. at 365. Before reaching that decision, however, the Court addressed at length whether the state also was a secured judgment creditor for purposes of the Tax Lien Act (*see id.* at 362-65) — an analysis that would be entirely superfluous if, as the government contends, the priority statute overrides all of the security interests protected by the Tax Lien Act in all cases where, as in *Gilbert Associates*, the debtor was insolvent. Justice Frankfurter confirmed what the Court's approach implies: after concluding that the state was secured for Tax Lien Act purposes, he did not concur in the judgment on the ground that the priority statute was controlling, but rather dissented from the Court's judgment in favor of the United States. *See id.* at 366-68 (Frankfurter, J., dissenting).[32]

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[32] The government relies heavily on dicta from *United States v. City of New Britain*, 347 U.S. 81 (1954), and *United States v. Vermont*, 377 U.S. 351 (1964). Pet. Br. 21-22. Because both cases involved solvent debtors, *see* 377 U.S. at 352; 347 U.S. at 85, the priority statute was clearly inapplicable, and the Court thus had no occasion to consider its interaction with the Tax Lien Act.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed.

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Dated: October 6, 1997

STATUTORY APPENDIX

STATUTORY APPENDIX

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FEDERAL PRIORITY STATUTE

31 U.S.C. § 3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

FEDERAL TAX LIEN ACT OF 1966

26 U.S.C. § 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6322. Period of lien

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

26 U.S.C. § 6323. Validity and priority against certain persons

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors

The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(b) Protection for certain interests even though notice filed

Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid—

(1) Securities

With respect to a security (as defined in subsection (h)(4))—

(A) as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B) as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles

With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if—

(A) at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B) before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail

With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale

With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) purchased (not for resale) in a casual sale for less than $250, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien

With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens

With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of—

(A) a tax of general application levied by any taxing authority based upon the value of such property;

(B) a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C) charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) Residential property subject to a mechanic's lien for certain repairs and improvements

With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $1,000.

(8) Attorneys' liens

With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforceable against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts

With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time—

(A) before such organization had actual notice or knowledge of the existence of such lien;

(B) after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C) after satisfaction of a levy pursuant to section 6332(b), unless and until the Secretary delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Passbook loans

With respect to a savings deposit, share, or other account, evidenced by a passbook, with an institution described in section 581 or 591, to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account and if such institution has been continuously in possession of such passbook from the time the loan is made.

(c) Protection for certain commercial transactions financing agreements, etc.

(1) In general

To the extent provided in this subsection, even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which—

(A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting—

(i) a commercial transactions financing agreement,

(ii) a real property construction or improvement financing agreement, or

(iii) an obligatory disbursement agreement, and

(B) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement

For purposes of this subsection—

(A) Definition

The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)—

(i) to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii) to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;

but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on qualified property

The term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial financing security defined

The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser treated as acquiring security interest

A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) Real property construction or improvement financing agreement

For purposes of this subsection—

(A) Definition

The term "real property construction or improvement financing agreement" means an agreement to make cash disbursements to finance—

(i) the construction or improvement of real property,

(ii) a contract to construct or improve real property, or

(iii) the raising or harvesting of a farm crop or the raising of livestock or other animals.

For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property

The term "qualified property", when used with respect to a real property construction or improvement financing agreement, includes only—

(i) in the case of subparagraph (A)(i), the real property with respect to which the construction or improvement has been or is to be made,

(ii) in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii) in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement

For purposes of this subsection—

(A) Definition

The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on qualified property

The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321 at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements

Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person—

(i) the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

(ii) if the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term

"qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(d) 45-day period for making disbursements

Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest—

(1) is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321, and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2) is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) Priority of interest and expenses

If the lien imposed by section 6321 is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to—

(1) any interest or carrying charges upon the obligation secured,

(2) the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3) the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) the reasonable costs of insuring payment of the obligation secured, and

(6) amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321,

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(f) Place for filing notice; form

(1) Place for filing

The notice referred to in subsection (a) shall be filed—

(A) Under State laws

(i) Real property

In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property

In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court

In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder of Deeds of the District of Columbia

In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien

For purposes of paragraphs (1) and (4), property shall be deemed to be situated—

(A) Real property

In the case of real property, at its physical location; or

(B) Personal property

In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.

For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form

The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property

In the case of real property, if—

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,

then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.

(5) National filing systems

The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

(g) Refiling of notice

For purposes of this section—

(1) General rule

Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) Place for filing

A notice of lien refiled during the required refiling period shall be effective only—

(A) if—

(i) such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii) in the case of real property, the fact of refiling is entered and recorded in an index to the extent required by subsection (f)(4); and

(B) in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulations issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) Required refiling period

In the case of any notice of lien, the term "required refiling period" means—

(A) the one-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien.

(4) Transitional rule

Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required refiling period shall be the calendar year 1967.

(h) Definitions

For purposes of this section and section 6324—

(1) Security interest

The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) Mechanic's lienor

The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) Motor vehicle

The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) Security

The term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) Tax lien filing

The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321.

(6) Purchaser

The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324—

(A) a lease of property,

(B) a written executory contract to purchase or lease property,

(C) an option to purchase or lease property or any interest therein, or

(D) an option to renew or extend a lease of property, which is not a lien or security interest shall be treated as an interest in property.

(i) Special rules

(1) Actual notice or knowledge

For purposes of this subchapter, an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routine. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless

he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) Subrogation

Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324.

(3) Forfeitures

For purposes of this subchapter, a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other local governmental subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county, or other local governmental subdivision in the property.

(j) Withdrawal of notice in certain circumstances

(1) In general

The Secretary may withdraw a notice of a lien filed under this section and this chapter shall be applied as if the withdrawn notice had not been filed, if the Secretary determines that—

(A) the filing of such notice was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the lien was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the withdrawal of such notice will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the Taxpayer Advocate, the withdrawal of such notice would be in the best interests of the taxpayer (as determined by the Taxpayer Advocate) and the United States.

Any such withdrawal shall be made by filing notice at the same office as the withdrawn notice. A copy of such notice of withdrawal shall be provided to the taxpayer.

(2) Notice to credit agencies, etc.

Upon written request by the taxpayer with respect to whom a notice of a lien was withdrawn under paragraph (1), the Secretary shall promptly make reasonable efforts to notify credit reporting agencies, and any financial institution or creditor whose name and address is specified in such request, of the withdrawal of such notice. Any such request shall be in such form as the Secretary may prescribe.

26 U.S.C. § 6324. Special liens for estate and gift taxes

(a) Liens for estate tax

Except as otherwise provided in subsection (c)—

(1) Upon gross estate

Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

(2) Liability of transferees and others

If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or

transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person, except any part transferred to a purchaser or a holder of a security interest.

(3) Continuance after discharge of fiduciary

The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

(b) Lien for gift tax

Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest.

(c) Exceptions

(1) The lien imposed by subsection (a) or (b) shall not be valid as against a mechanic's lienor and, subject to the conditions provided by section 6323(b) (relating to protection for certain interests even though noticed filed), shall not be valid with respect to any lien or interest described in section 6323(b).

(2) If a lien imposed by subsection (a) or (b) is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to any item described in section 6323(e) (relating to priority of interest and expenses) to the extent that, under local law, such item has the same priority as the lien or security interest to which it relates.

26 U.S.C. § 6324A. Special lien for estate tax deferred under section 6166

(a) General rule

In the case of any estate with respect to which an election has been made under section 6166, if the executor makes an election under this section (at such time and in such manner as the Secretary shall by regulations prescribe) and files the agreement referred to in subsection (c), the deferred amount (plus any interest, additional amount, addition to tax, assessable penalty, and costs attributable to the deferred amount) shall be a lien in favor of the United States on the section 6166 lien property.

(b) Section 6166 lien property

(1) In general

For purposes of this section, the term "section 6166 lien property" means interests in real and other property to the extent such interests—

(A) can be expected to survive the deferral period, and

(B) are designated in the agreement referred to in subsection (c).

(2) Maximum value of required property

The maximum value of the property which the Secretary may require as section 6166 lien property with respect to any estate shall be a value which is not greater than the sum of—

(A) the deferred amount, and

(B) the required interest amount.

For purposes of the preceding sentence, the value of any property shall be determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11 and shall be determined by taking into account any encumbrance such as a lien under section 6324B.

(3) Partial substitution of bond for lien

If the value required as section 6166 lien property pursuant to paragraph (2) exceeds the value of the interests in property covered by the agreement referred to in subsection (c), the Secretary may accept bond in an amount equal to such excess conditioned on the payment of the amount extended in accordance with the terms of such extension.

(c) Agreement

The agreement referred to in this subsection is a written agreement signed by each person in being who has an interest (whether or not in possession) in any property designated in such agreement—

(1) consenting to the creation of the lien under this section with respect to such property, and

(2) designating a responsible person who shall be the agent for the beneficiaries of the estate and for the persons who have consented to the creation of the lien in dealings with the Secretary on matters arising under section 6166 or this section.

(d) Special rules

(1) Requirement that lien be filed

The lien imposed by this section shall not be valid as against any purchaser, holder of a security interest, mechanic's lien, or judgment lien creditor until notice thereof which meets the requirements of section 6323(f) has been filed by the Secretary. Such notice shall not be required to be refiled.

(2) Period of lien

The lien imposed by this section shall arise at the time the executor is discharged from liability under section 2204 (or, if earlier, at the time notice is filed pursuant to paragraph (l)) and shall continue until the liability for the deferred amount is satisfied or becomes unenforceable by reason of lapse of time.

(3) Priorities

Even though notice of a lien imposed by this section has been filed as provided in paragraph (1), such lien shall not be valid—

(A) Real property tax and special assessment liens

To the extent provided in section 6323(b)(6)

(B) Real property subject to a mechanic's lien for repairs and improvements

In the case of any real property subject to a lien for repair or improvement, as against a mechanic's lienor.

(C) Real property construction or improvement financing agreement.

As against any security interest set forth in paragraph (3) of section 6323(c) (whether such security interest came into existence before or after tax lien filing).

Subparagraphs (B) and (C) shall not apply to any security interest which came into existence after the date on which the Secretary filed notice (in a manner similar to notice filed under section

6323(f)) that payment of the deferred amount has been accelerated under section 6166(g).

(4) Lien to be in lieu of section 6324 lien

If there is a lien under this section on any property with respect to any estate, there shall not be any lien under section 6324 on such property with respect to the same estate.

(5) Additional lien property required in certain cases

If at any time the value of the property covered by the agreement is less than the unpaid portion of the deferred amount and the required interest amount, the Secretary may require the addition of property to the agreement (but he may not require under this paragraph that the value of the property covered by the agreement exceed such unpaid portion). If property having the required value is not added to the property covered by the agreement (or if other security equal to the required value is not furnished) within 90 days after notice and demand therefor by the Secretary, the failure to comply with the preceding sentence shall be treated as an act accelerating payment of the installments under section 6166(g).

(6) Lien to be in lieu of bond

The Secretary may not require under section 6165 the furnishing of any bond for the payment of any tax to which an agreement which meets the requirements of subsection (c) applies.

(e) Definitions

For purposes of this section—

(1) Deferred amount

The term "deferred amount" means the aggregate amount deferred under section 6166 (determined as of the date prescribed by section 6151(a) for payment of the tax imposed by chapter 11).

(2) Required interest amount

The term "required interest amount" means the aggregate amount of interest which will be payable over the first 4 years of the deferral period with respect to the deferred amount (determined as of the date prescribed by section 6151(a) for the payment of the tax imposed by chapter 11).

(3) Deferral period

The term "deferral period" means the period for which the payment of tax is deferred pursuant to the election under section 6166.

(4) Application of definitions in case of deficiencies

In the case of a deficiency, a separate deferred amount, required interest amount, and deferral period shall be determined as of the due date of the first installment after the deficiency is prorated to installments under section 6166.

26 U.S.C. § 6324B. Special lien for additional estate tax attributable to farm, etc., valuation

(a) General rule

In the case of any interest in qualified real property (within the meaning of section 2032A(b)), an amount equal to the adjusted tax difference attributable to such interest (within the meaning of section 2032A(c) (2) (B)) shall be a lien in favor of the United States on the property in which such interest exists.

(b) Period of lien

The lien imposed by this section shall arise at the time an election is filed under section 2032A and shall continue with respect to any interest in the qualified real property—

(1) until the liability for tax under subsection (c) of section 2032A with respect to such interest has been satisfied or has become unenforceable by reason of lapse of time, or

(2) until it is established to the satisfaction of the Secretary that no further tax liability may arise under section 2032A(c) with respect to such interest.

(c) Certain rules and definitions made applicable

(1) In general

The rule set forth in paragraphs (1), (3), and (4) of section 6324A(d) shall apply with respect to the lien imposed by this section as if it were a lien imposed by section 6324A.

(2) Qualified real property

For purposes of this section, the term "qualified real property" includes qualified replacement property (within the meaning of section 2032A(h) (3) (B)) and qualified exchange property (within the meaning of section 2032A(i) (3)).

(d) Substitution of security for lien

To the extent provided in regulations prescribed by the Secretary, the furnishing of security may be substituted for the lien imposed by this section.

(5)

Supreme Court, U.S.
FILED
NOV 5 1997
CLERK

No. 96-1613

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217-0001

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1613

UNITED STATES OF AMERICA, PETITIONER

v.

ESTATE OF FRANCIS J. ROMANI

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent devotes the first and largest portion of its argument (Resp. Br. 10-26) to a contention that was neither raised nor addressed in the courts below. The question addressed below was whether the preference established by the absolute priority statute for claims of the United States was implicitly repealed, for tax claims, by the provisions of the Federal Tax Lien Act. Respondent now asserts, however, that it was "incorrect" for the Pennsylvania Supreme Court to reach and decide that question (Resp. Br. 10). Respondent asserts that it is unnecessary to reach that question because this case involves a competing private judgment lien and, in respondent's view, the absolute priority statute "does not override judgment liens on real property" (*ibid.*). Respondent claims that the Pennsylvania Supreme Court was "incorrect" in assuming to the contrary (*ibid.*).

Respondent did not raise this contention in the courts below or in its brief in opposition at the petition stage. To the contrary, the brief filed by respondent in the Pennsylvania Supreme Court reflects the very same "assumption" that respondent now criticizes that court for making (Resp. Br. 10; see Resp. Br. Pa. Sup. Ct. 2, 4-10). It is plainly "inappropriate" for respondent to disavow its long-standing position and seek to raise a new contention in this Court "in the first instance." *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971). See also *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); Sup. Ct. R. 15.2. Moreover, the new contention that respondent belatedly seeks to advance has been addressed and rejected by this Court on several occasions.

a. The plain text of the absolute priority statute requires any claim of the United States to "be paid first" from the estate of an insolvent debtor. 31 U.S.C. 3713(a). In *Thelusson* v. *Smith*, 15 U.S. (2 Wheat.) 396 (1817), this Court held that the absolute priority statute requires debts owed to the United States to be paid first even when a competing creditor possesses a valid and enforceable judgment lien in the assets of the estate. The Court stated (*id.* at 426):

> A judgment gives to the judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgment-creditors. But the act of congress defeats this preference in favour of the United States, in the cases specified in the 65th section of the act of 1799.

The Court concluded that, for a competing private lien claim to be excepted from the operation of the absolute priority statute, the property to which the lien applies

must be divested from the debtor's estate before the claim of the United States accrued (*ibid.*):[1]

> If * * * before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is divested out of the debtor, and cannot be made liable to the United States.

This Court has often cited and relied on this holding of *Thelusson*. See, *e.g.*, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 366 (1953); Pet. Br. 15. Applying *Thelusson*, the Court has consistently concluded that, so long as the property has not been "divested" from the debtor's estate by "a change of title or possession," the absolute preference established by the statute for the United States to "be paid first" from the assets of that estate is controlling. *New York* v. *Maclay*, 288 U.S. 290, 293-294 (1933).[2]

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[1] The abbreviation "*fi. fa.*" in this passage from the decision in *Thelusson* refers to the common law writ of *fieri facias*. That writ commanded the sheriff to execute on a judgment by seizing and selling the personal and real property of the judgment debtor. See, *e.g.*, Shippen Lewis, *Eliminating Archaic Features of Execution Process in Pennsylvania*, 63 U. Pa. L. Rev. 652, 652-653, 656 (1915); *W.H. Powell Lumber Co.* v. *Federal Land Bank Ass'n*, 561 S.W.2d 700, 703 (Mo. Ct. App. 1978); *Black's Law Dictionary* 754 (4th ed. 1968).

[2] The Court has often emphasized that any creditor who seeks to establish an implied exception from the absolute priority statute bears a heavy burden. See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805); Pet. Br. 17-18. Respondent simply overlooks this precedent in contending that "the government bears a heavy burden to establish that the federal priority statute abrogates centuries of common-law protection" (Resp. Br. 12). In *Thelusson* and *New York* v. *Maclay*, *supra*, the Court plainly rejected the suggestion that there is "common-

This longstanding interpretation of the absolute priority statute is entitled to especially heavy deference. As this Court stated in *Neal* v. *United States*, 116 S. Ct. 763, 769 (1996):

> [W]e give great weight to *stare decisis* in the area of statutory construction [unless] * * * intervening development of the law has "removed or weakened the conceptual underpinnings from the prior decision or * * * later law has rendered the decision irreconcilable with competing legal doctrines or policies." * * * Absent those changes or compelling evidence bearing on Congress' original intent, *NLRB* v. *Longshoremen*, 473 U.S. 61, 84 (1985), our system demands that we adhere to our prior interpretations of statutes [even where] * * * there may be little in logic to defend the statute's treatment * * *.

b. Respondent errs in contending that this Court has "disavowed the broad holding" of *Thelusson* (Resp. Br. 18). In *New York* v. *Maclay*, 288 U.S. at 293-294, the Court adopted the very holding that respondent claims has been "disavowed." In that case, the Court explained that a judgment lien creditor who has not obtained "title or possession" from the estate "by seizure * * * or some other equivalent act" cannot prevail against the plain command of the statute that the United States "be paid first." *Ibid.* See also *United States* v. *Gilbert Associates, Inc.*, 345 U.S. at 366 (the competing creditor must have "divested" the insolvent debtor "of either title or possession"); Pet. Br. 15 (citing cases).[3]

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law protection" for judgment liens from the absolute priority of the United States. See also note 3, *infra*.

[3] Respondent urges that judgment liens are traditionally perfected without acquiring possession of the property and that the government's position in this case is therefore "unwarranted as a matter of precedent, history, and common sense" (Resp. Br. 20). That argument simply misses the point of *Thelusson* and its numerous progeny. The fact that the private lien may be valid as against other liens does not mean that it defeats the absolute priority of the government's claim in insolvencies. In *United States* v. *Gilbert Associates, Inc.*, *supra*, the Court relied on *Thelusson* in holding that a federal tax claim is entitled to priority over a prior-filed state tax lien. The Court stated (345 U.S. at 366):

> In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. *Thelusson* v. *Smith*, 2 Wheat. 396. Until such possession, it remains a general lien.

When the private creditor has not taken sufficient steps to "divest" the property from the insolvent's estate, the United States "shall be paid first" under the plain text of the statute. 31 U.S.C. 3713(a). The Court thus held in *Gilbert Associates* that, because "[t]he taxpayer had not been divested by the Town of either title or possession * * *, [the absolute priority statute] clearly awards priority to the United States" (345 U.S. at 366).

Respondent is also incorrect in its premise (Resp. Br. 20-21) that the decisions establishing this rule involved only personal, and not real, property. *Thelusson* v. *Smith* itself involved a judgment lien on real property. See 15 U.S. (2 Wheat.) at 425.

[4] In *United States* v. *Hooe*, 7 U.S. (3 Cranch) at 91, the absolute priority statute was inapplicable because the debtor's deed of trust conveyed only part of his property to trustees. For the absolute priority statute to be applicable, it was necessary for the debtor to have made a

Respondent is also incorrect in claiming that, in four early decisions, the Court rejected the analysis of *Thelusson* and held that "the federal priority statute does not override antecedent security interests" (Resp. Br. 16, 18). Two of the cases that respondent cites (*United States* v. *Hooe*, 7 U.S. (3 Cranch) 73 (1805); *United States* v. *Hack*, 33 U.S. (8 Pet.) 271 (1834)) do not even involve the question of the effect of the absolute priority statute on perfected liens.[4] The other two cases (*Conard* v. *Atlantic Insur-*

ance Co., 26 U.S. (1 Pet.) 386 (1828); *Brent* v. *Bank of Washington*, 35 U.S. (10 Pet.) 596 (1836)) are fully consistent with *Thelusson*. The creditor in both *Conard* and *Brent*, unlike the creditor in *Thelusson*, obtained title or possession of the disputed property *before* the government's priority claim accrued.[5] As this Court explained in *Massachusetts* v. *United States*, 333 U.S. 611, 634 n.38 (1948), the decisions in *Conard* and *Brent* "did not contemplate that exceptions were being made" from the absolute priority statute but "conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor." In arguing to the contrary, respondent ignores the Court's explanation of its own decisions and, in particular, ignores the Court's

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voluntary assignment of all his property. *Ibid*. See also 31 U.S.C. 3713(a)(1)(A)(i).

In *United States* v. *Hack*, 33 U.S. (8 Pet.) at 275, the absolute priority statute was inapplicable because the funds assigned for the benefit of creditors were "not the funds of John Stouffer, the debtor of the United States, but of [the partnership] of John and Jacob Stouffer * * *; and the partnership property is insufficient to satisfy the partnership creditors."

[5] *Conard* v. *Atlantic Insurance Co.*, 26 U.S. (1 Pet.) at 446, involved a competing creditor who possessed an endorsed bill of lading that "purport[ed] to be a transfer *in praesenti*" and which served as "a mortgage of the goods, and the returns" (*id.* at 447). *Brent* v. *Bank of Washington*, 35 U.S. (10 Pet.) at 614, involved the right of the issuer of stock to refuse any transfer until the obligations owed to it were fully paid.

Respondent errs in relying (Resp. Br. 17) on *United States* v. *Lewis*, 26 F. Cas. 320 (C.C. E.D. Pa.) (No. 15,595), aff'd, 92 U.S. 618 (1875). The rights of lienholders under the absolute priority statute were not at issue in that case because, as the court noted, "there are no liens in this case to interfere with the priority of the United States." 26 F. Cas. at 924.

emphatic warning that it is "loath to expand" such an exception "to include other types of lien" (*ibid.*).

The Court similarly distinguished *Conard* and *Brent* in *New York* v. *Maclay*, 288 U.S. at 293-294. The Court observed that the distinction between *Conard* and *Brent* on the one hand, and the *Thelusson* line of cases on the other, flows from the "distinction between the liens of judgments and of mortgages." *Id.* at 294. The Court explained that, while a judgment lien does not effect a transfer of title or possession, mortgage liens "have been thought to have the effect of a conveyance, divesting the debtor of his title and leaving nothing but an equity to which a preference can attach." *Ibid.*.[6]

The decisions of this Court have consistently articulated the principle that a "general judgment lien upon the lands of an insolvent debtor does not take precedence over claims of the United States unless execution of the judgment has proceeded far enough to take the land out of the possession of the debtor." *United States* v. *Texas*, 314 U.S. 480, 485 (1941).[7] The competing creditor cannot prevail against the absolute priority of the United States in insolvency cases unless the creditor has obtained title or

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[6] The Court noted in *New York* v. *Maclay*, 288 U.S. at 294, that it had not determined "whether the holding in the mortgage cases is to be applied in jurisdictions where a mortgage upon real estate is a lien and nothing more." Because that case, like the present case, did not involve a mortgage, the Court stated that "[i]nto these refinements and their consequences, there is no need to enter now." *Ibid*.

[7] The Court noted in *United States* v. *Texas*, 314 U.S. at 486, that early decisions had held that a mortgagee would avoid the government's absolute priority. The Court stated, however, "that it intended by its decision to lend no support to the assumption that the doctrine of the mortgage cases, whatever its current vitality, would require the subordination of unsecured claims of the United States to a specific and perfected lien." *Ibid*.

possession of the disputed asset and thus divested that asset from the insolvent's estate in advance of the accrual of the government's claim. See, *e.g.*, *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. 362, 376 (1946); note 3, *supra*.[8]

c. Respondent mistakenly asserts (Resp. Br. 21-22) that a lien that is perfected under state law is necessarily excepted from the government's absolute priority in insolvency. To be excepted from the operation of the absolute priority statute, it is a necessary but not a sufficient condition for the lien to be perfected under state law. *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. at 371 ("[A] state court's characterization of a lien as specific and perfected is not conclusive" for purposes of the absolute priority statute.); *Spokane County* v. *United States*, 279 U.S. 80, 95 (1929). See note 3, *supra*. See *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 357 (1945). In addition to being perfected under state law, a competing lien can defeat the federal claim under the absolute priority statute only if "before the right of preference has accrued to the United States * * * the property is divested out of the debtor." *Thelusson* v. *Smith*, 15 U.S. (2 Wheat) at 426. Such divestment occurs when "seizure by a marshal or some other equivalent act has * * * brought about a change of title or possession." *New York* v. *Maclay*, 288 U.S. at 293-294. Unless the private lien "divests" title or possession of the asset from the debtor's

[8] Respondent misstates our position by claiming that the United States advocates "that judgment liens, for purposes of the priority statute, are not perfected unless and until they are reduced to possession" (Resp. Br. 23). See also *id.* at 20. We advocate only what this Court held in *Thelusson* v. *Smith*, *New York* v. *Maclay*, and other similar cases (Pet. Br. 15)—that a private judgment creditor may avoid the absolute priority of the United States only by "divesting" the disputed property from the insolvent's estate by obtaining a change of possession *or* title before the government's absolute priority accrues.

estate, the priority of the United States remains absolute. See note 3, *supra*. See also *United States* v. *Vermont*, 377 U.S. 351, 358 n.8 (1964); Pet. Br. 15 n.5.

Respondent is thus not correct in asserting that its judgment lien "satisfies all of the federal requirements imposed by this Court" for a private lien to prevail against the government's absolute priority (Resp. Br. 20). Although respondent possessed a valid judgment lien, respondent took no steps to execute on that lien or to obtain title or possession of the property before the absolute priority of the government arose. See *Illinois ex rel. Gordon* v. *Campbell*, 329 U.S. at 376 (the competing lien is not excepted from the absolute priority statute because the creditor "acquired neither title nor possession, *Thelusson* v. *Smith*").

d. Respondent asserts that the longstanding rule of the *Thelusson* line of cases poses "significant practical problems" for commercial creditors (Resp. Br. 23). It is apparent, however, that commercial creditors have been able to coexist with the absolute priority statute—and with this Court's application of that statute to judgment liens—during the 180 years since *Thelusson* was decided. History refutes respondent's concern over "practical" problems.[9] See also notes 6 & 7, *supra*.

[9] Contrary to respondent's assumption, commercial security interests are not inherently impervious to competing interests. For example, under the Uniform Commercial Code, a buyer in the ordinary course of business takes free of a security interest in inventory created by the seller even though the security interest is perfected and even though the buyer knows of its existence. See, *e.g.*, 13 Pa. Cons. Stat. Ann. § 9307 (Purdon 1984). Numerous provisions of the Uniform Commercial Code require a secured party to obtain possession of particular kinds of collateral to defeat the interests of third parties or other secured creditors. See, *e.g.*, *id.* § 9304 (letters of credit, money, instruments other than instruments constituting a part of chattel paper),

This Court has, in any event, repeatedly rejected reliance upon such "practical" objections to the absolute priority statute. See *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805); Pet. Br. 32-33. As the Court stated in *United States* v. *Emory*, 314 U.S. 423, 431 (1941):

> In the first place, whatever may be the merits of the contention, it should be addressed to Congress and not to this Court. In the second place, the argument proves too much. If it is sound as applied to this kind of a claim of the United States, it is equally sound as applied to all claims as to which the United States asserts priority under [the absolute priority statute].

e. Respondent objects (Resp. Br. 24) to the fact that creditors of an insolvent debtor may receive different treatment under the absolute priority statute than they would under the Bankruptcy Code. Congress, of course, directly provided for that result in 1978, when it elected to make the absolute priority statute inapplicable to cases brought under the Bankruptcy Code. 31 U.S.C. 3713(a)(2); Pet. Br. 12 n. 4. By *expressly* eliminating application of the absolute priority statute in one carefully drawn context, Congress cannot be understood *impliedly* to have eliminated the statutory priority in all other contexts as well.

f. Respondent errs in asserting that the absolute priority statute runs afoul of the Takings Clause of the Fifth Amendment (Resp. Br. 25-26). The absolute priority statute was enacted almost 200 years before respondent acquired its judgment lien. Whatever rights respondent

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§ 9305 (goods, instruments, money, negotiable instruments, chattel paper), § 9308 (purchaser of chattel paper or instruments), § 9309 (holder in due course of negotiable instrument, or holder to whom a negotiable document of title has been negotiated, or protected purchaser of security).

acquired under its lien, those rights were subject to the preexisting scheme of regulation—and to the absolute priority statute.

In a few narrow settings, this Court has construed statutes affecting the rights of creditors to be prospective in their application to avoid takings issues. See, *e.g.*, *United States* v. *Security Industrial Bank*, 459 U.S. 70, 78-82 (1982). The application to respondent of this Court's 180-year-old precedents interpreting this 200-year-old statute threatens no retroactive taking of rights: "since the insolvency act has been a law of the United States * * * for approximately two hundred (200) years, this is not a case where the United States has taken action to destroy or deprive a judgment lienholder of property rights which existed before the government's action." *Westmoreland* v. *Westmoreland*, 716 F. Supp. 217, 222 (D.S.C. 1988). See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

2. The Federal Tax Lien Act does not impliedly repeal application of the absolute priority statute to tax claims of the United States.

a. The Court has clearly described the standard that must be met to sustain the heavy burden of establishing an implied repeal of the absolute priority statute. Recognizing that the statute "on its face permits no exception whatsoever" (*United States* v. *Vermont*, 377 U.S. at 357), the Court has held that "[o]nly the plainest inconsistency would warrant * * * finding an implied exception to the operation of so clear a command * * *." *United States* v. *Emory*, 314 U.S. at 433. The Court explained in *United States* v. *Key*, 397 U.S. 322, 332 (1970), that the requisite "plainest inconsistency" could occur only if (i) the competing statute is logically inconsistent with the absolute priority statute; (ii) an unconditional application of the absolute priority statute would deprive the competing

statute of any meaning; or (iii) the history and text of the competing statute reflect an actual intent by Congress to modify the absolute priority statute. *Id.* at 324-326, 332. For the reasons described in our opening brief (Pet. Br. 19-33) and further discussed below (pages 17-19, *infra*), that standard is not met in this case.

b. Recognizing the heavy burden imposed by this standard, respondent seeks to invoke an entirely different principle of statutory construction. Respondent urges the Court to apply the interpretive principle that "a specific statute" should prevail in a conflict "with an *earlier* and more general statute" (Resp. Br. 28).[10] Respondent asserts that, in five early decisions involving the absolute priority statute, the Court applied that interpretive principle rather than the "plainest inconsistency" standard articulated in *Emory* and *Key* (Resp. Br. 29-30).[11]

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[10] Respondent incorrectly asserts that the government's brief in the court below acknowledged that, if a "general" statute must give way to a "specific" statute, the broad mandate of the absolute priority statute "should yield to the specific priorities of the tax lien legislation" (Resp. Br. 30 n.28). The material that respondent quotes is an extract from a law review note set forth in our brief; it is not from the text of the government's argument. Moreover, the portion of the note that respondent *fails* to quote is directly at odds with the position that respondent urges (U.S. Br. Pa. Sup. Ct. 26, quoting Note, *Nesbitt v. United States: Denying an Implied Tax Lien Exception to the Federal Priority in Insolvency*, 33 Cath. U. L. Rev. 741, 772 (1984)):

> Though general rules of construction suggest that the broad mandate of section 3466 should yield to the specific priorities prescribed by the tax lien legislation, such rules are inapplicable in light of the Supreme Court's demonstrated attitude of special deference to the Insolvency Statute. Rather, the three-part "plainest inconsistency" test enunciated by the Court in *United States v. Key* must control * * *.

[11] The cases on which respondent relies are *United States* v. *Guaranty Trust Co.*, 280 U.S. 478 (1930); *Mellon* v. *Michigan Trust Co.*, 271 U.S. 236 (1926); *Davis* v. *Pringle*, 268 U.S. 315 (1925); *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.*, 224 U.S. 152 (1912); and *Cook County National Bank* v. *United States*, 107 U.S. 445 (1883). These cases were all decided before the Court described the "plainest inconsistency" standard in *Emory* in 1941 and before the Court further articulated that standard in *Key* in 1970. It is implausible for respondent to rely on pre-*Emory* decisions to contend that the interpretive standard adopted and applied in *Emory* and *Key* is no longer controlling. See notes 12 & 13, *infra*.

This Court has, however, previously addressed and rejected that contention. In *United States* v. *Emory*, 314 U.S. at 432-433, the Court reviewed the very decisions on which respondent relies and concluded that they are consistent with the requirement that "[o]nly the plainest inconsistency" with the absolute priority statute "would warrant our finding an implied exception" to that statute. *Id.* at 433. In *Emory*, the Court rejected the contention that the more specific and more recent provisions of the National Housing Act superseded application of the absolute priority statute to government loan claims arising under that Act (314 U.S. at 430):

> We are aware of no canon of statutory construction compelling us to hold that the word "first" in a 150 year old statute means "second" or "third," unless Congress later has said so or implied it unmistakably.

Explaining that "[o]nly the plainest inconsistency would warrant our finding an implied exception" to the absolute priority statute (*id.* at 433), the Court reviewed the earlier decisions on which respondent now relies (note 11, *supra*) and held that they do not "require[] a different conclusion" (*id.* at 431-432).[12]

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[12] The Court distinguished *Cook County National Bank* v. *United States*, *supra*, on the ground that the statute involved in that case "included specific provisions concerning the distribution of the assets of insolvent banks which were plainly inconsistent with the granting of

Following the decision in *Emory*, the Court has consistently applied the standard articulated in that case in evaluating claims of an implied repeal of the absolute priority statute. See, *e.g.*, *United States* v. *Moore*, 423 U.S. 77, 82-83 (1975); *SBA* v. *McClellan*, 364 U.S. 446, 453 (1960) (absolute priority statute is not "plainly inconsistent" with the purposes and provisions of the Small Business Act); *United States Department of Agriculture* v. *Remund*, 330 U.S. 539, 544 (1947) ("there is no irreconcilable conflict between giving emergency loans to distressed farmers and giving priority to the collection of these loans pursuant to § 3466"); *Massachusetts* v. *United States*, 333 U.S. at 634; *Illinois* v. *United States*, 328 U.S. 8, 12 (1946).[13] In *United States* v. *Key*, *supra*, this Court elaborated the standard of *Emory* by establishing a three-part test for determining whether a plain inconsistency exists between the absolute priority statute and subsequent legislation. See pages 11-12, *supra*. The Court has

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priority to general claims of the United States." *United States* v. *Emory*, 314 U.S. at 432. The Court similarly distinguished *United States* v. *Guaranty Trust Co.*, *supra*, on the ground that there was a "direct inconsistency" between the Transportation Act of 1920 and the absolute priority statute that precluded application of the latter statute. *United States* v. *Emory*, 314 U.S. at 432-433. See also note 13, *infra*.

[13] In *United States Department of Agriculture* v. *Remund*, 330 U.S. at 544-545, the Court reversed the decision of the court of appeals which had relied (as respondent would) on *United States* v. *Guaranty Trust Co.*, *supra*, in holding that emergency loans made to farmers pursuant to the Acts of February 23, 1934, and June 19, 1934, were excepted from the absolute priority statute. The Court stated (330 U.S. at 544-545):

> We reiterate what was said in *United States* v. *Emory*, 314 U.S. 423, 433: "Only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466 [the absolute priority statute]." In this case, as in that, we think such inconsistency is wholly wanting. *United States* v. *Guaranty Trust Co.*, *supra*, is therefore inapposite.

now consistently applied the interpretive principles established in *Emory* and *Key* for more than fifty years. See, *e.g.*, *United States* v. *Moore*, 423 U.S. at 82-83; Pet. Br. 17-18. As the Court has expressly concluded, nothing in the cases on which respondent relies supports a departure from that analysis. *United States* v. *Emory*, 314 U.S. at 431-432; notes 12 & 13, *supra*.

c. The interpretive principle that a more specific and recent provision may impliedly repeal a more general statute does not, in any event, support respondent's position in this case. It is not realistic to assert that *either* of the two statutes involved in this case is "more specific" than the other. The absolute priority statute and Section 6323 are *both* "specific" statutes that apply only in narrowly and precisely defined situations.

The absolute priority statute applies only to insolvencies that are manifested in one of the modes specified by the statute—to cases in which the estate of a debtor is insolvent, cases in which the debtor makes a voluntary assignment of his property, and cases in which the property of an absent debtor is attached. 31 U.S.C. 3713(a)(1)(A); *United States* v. *Oklahoma*, 261 U.S. 253, 259-260 (1923). The absolute priority statute has no application to the far greater number of cases that involve either solvent debtors or insolvent debtors in bankruptcy. 31 U.S.C. 3713(a)(2). The rights of competing creditors in those ordinary situations are determined under the tax lien provisions of 26 U.S.C. 6323 and not under the absolute priority statute.[14]

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[14] "Where one of the competing liens is a federal tax lien," the provisions of 26 U.S.C. 6323 determine the lien priorities in bankruptcy cases. *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1176 (6th Cir. 1990). Moreover, the bankruptcy trustee is armed with the status of a hypothetical judgment lien creditor and bona fide purchaser of real property (11 U.S.C. 544) and 26 U.S.C. 6323 determines whether the

Indeed, there are vastly more tax claims asserted in cases involving solvent debtors and in bankruptcy cases (to which the federal tax lien rules set forth in 26 U.S.C. 6323 apply) than in non-bankruptcy insolvencies (to which the absolute priority statute applies).[15] Thus, while the absolute priority statute could be said to be more "general" in the sense that it applies to non-tax as well as tax claims of the government, it is more "specific" in that it is inapplicable to solvent debtors and to insolvent debtors in bankruptcy. Conversely, while the federal tax lien provisions are more "general" in the sense that they apply to the typical debtors who are either solvent or in bankruptcy, they are more "specific" in the sense that they apply only to tax claims.

The proper reconciliation of any competing applications of these two statutes thus cannot rationally be resolved based upon generalities about which statute is more "specific" and which is more "general" in nature. Instead, recognizing the age and narrow sphere of operation of the absolute priority statute, the Court has consistently concluded that the clear command of that statute that the United States "be paid first" (31 U.S.C. 3713(a)) "must

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trustee may avoid the tax lien in bankruptcy. *In re LMS Holding Co.*, 50 F.3d 1526 (10th Cir. 1995). Cf. *Farrey* v. *Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy.").

[15] The Internal Revenue Service advises us that, for the period of October 1, 1994, to September 30, 1996, there were 89,740 bankruptcy cases in which the United States filed tax claims. During that same period, there were 565 cases involving the absolute priority statute in which the government filed claims. Of those 565 cases, 121 arose in general receivership proceedings and 444 arose in decedent's or incompetent's estates. The tax claims filed in bankruptcy proceedings totaled $3.6 billion to $4 billion per year. The tax claims filed in cases involving the absolute priority statute averaged $150 million per year.

apply according to its terms except where expressly superseded, or where excluded by a later enactment 'plainly inconsistent' with it." *United States* v. *Key*, 397 U.S. at 332. See also Pet. Br. 17-18.

d. As we explain in detail in our opening brief (Pet. Br. 19-21), the absolute priority statute and the federal tax lien provisions are not logically or "plainly" inconsistent. The two statutes differ in their scope and address different concerns.

The absolute priority statute governs the priority of claims of the United States only in specified types of insolvencies. 31 U.S.C. 3713(a)(1). The Court has long noted that, in enacting the absolute priority statute, Congress deliberately chose to establish greater protection for the United States in cases involving insolvent debtors than in cases "[w]here the debtor is not insolvent." *United States* v. *Vermont*, 377 U.S. at 358. To accomplish this greater protection in this narrow category of cases, the absolute priority statute operates independently of liens possessed by the United States, including liens for taxes. In the narrow situations to which it applies, the absolute priority statute requires the United States to "be paid first" "whether or not [its claim is] secured by a lien." *Id.* at 357. Accord, *United States* v. *City of New Britain*, 347 U.S. 81, 85 (1954). There is no logical inconsistency in the decision of Congress to give the United States priority in the narrow categories of cases described in the absolute priority statute while *not* giving it priority in other settings. See *United States* v. *Vermont*, 377 U.S. at 358.

Respondent errs in asserting that, if the absolute priority statute governs according to its terms in cases involving tax claims, the federal tax lien provisions of 26 U.S.C. 6323 would be made inoperative "in the vast majority of cases where those priorities could even possibly be signifi-

cant" (Resp. Br. 33).[16] Far more tax claims are determined in cases involving solvent debtors and in bankruptcy cases—to which the federal tax lien rules apply—than in the narrowly-defined insolvency situations to which the absolute priority statute is applicable. See note 15, *supra*. It is the federal tax lien provisions, not the absolute priority statute, that apply "in the vast majority of cases."

e. Respondent erroneously asserts that "[t]he legislative history of the Tax Lien Act and its predecessors confirms that the Congress intended for the Act to apply to all tax claims, even where the debtor is insolvent" (Resp. Br. 34). There is no support for that assertion, and respondent cites none. Instead, as we demonstrate in our opening brief (Pet. Br. 24-26), the legislative history is overwhelmingly to the contrary.

From the enactment of the predecessor of 26 U.S.C. 6323 in 1913 through the revisions of that statute in the Federal Tax Lien Act in 1966, nothing in the legislative history suggests that Congress intended to depart from the traditional protection it has afforded to the claims of the United States in insolvency cases under the absolute priority statute. Instead, as we describe in detail in our opening brief (Pet. Br. 24-28 & n.10), the history of the tax lien provisions reflects that Congress declined to enact several contemporaneous and related proposals to repeal

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[16] Respondent acknowledges that there are some "cases where the Tax Lien Act priorities would matter even though the debtor was solvent" (Resp. Br. 33). In addition to bankruptcy cases, priorities under 26 U.S.C. 6323 control when the proceeds of specific property involved in a case involving a solvent debtor are insufficient to satisfy the interests of the claimants. See *United States* v. *Cutting & Trimming, Inc.*, 206 F. Supp. 951 (D. Vt. 1962), aff'd *sub nom. United States* v. *Vermont, supra* (in an action to foreclose a tax lien, the absolute priority statute did not apply because the record disclosed no insolvency on the part of the taxpayer); *United States* v. *New Britain*, 347 U.S at 85-86.

or modify the absolute priority statute. When a similar bill to delete application of the absolute priority statute to tax claims was proposed in 1970, Congress again declined to enact it (Pet. Br. 27). This history of persistent congressional refusals to adopt the very amendment to the absolute priority statute that respondent now seeks to accomplish through litigation plainly does not constitute a "manifestation of congressional intent" impliedly to repeal that statute. *United States* v. *Key*, 397 U.S. at 324.

f. There is thus no logical inconsistency between the absolute priority statute and the federal tax lien statute. Application of the "clear[] * * * command" of the absolute priority statute does not deprive the tax lien provisions of meaning. And, the legislative history does not reflect any actual intent of Congress impliedly to repeal the absolute priority statute in enacting the federal tax lien provisions. The "plainest inconsistency" required to establish "an implied exception" to the absolute priority statute does not exist. *United States* v. *Emory*, 314 U.S. at 433.

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For the foregoing reasons and those stated in our opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted.

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NOVEMBER 1997